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Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA,

RESPONDENT

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA,

RESPONDENT

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

The Petitioners City of Henderson, a Nevada Municipal Corporation, et al. (hereinafter "Petitioner City of Henderson") respectfully renew their prayer previously made in their first petition for writ of certiorari in City of Henderson et al. v. United States District Court, District of Nevada, Nevada Entertainment Industries,

Inc. et al., Real Parties in Interest, October Term 1990, No. 90-1771, that a writ of certiorari be issued to review: (1) the March 22, 1991 and April 9, 1991 orders of the United States District Court, which denied both the City's first motion to dismiss the civil rights action and the city's motion to certify an interlocutory appeal of the refusal to dismiss the civil rights lawsuit, and (2) the May 2, 1991 order of the United States Court of Appeals for the Ninth Circuit (Norris, Beezer and O'Scannlan) which denied the City's petition for writ of mandamus. The City's first motion to dismiss contended that, under the Eleventh Amendment and Huffman v. Pursue, Ltd. 420 U.S. 592 (1975), a dismissal was mandated because of the federal court's lack of subject matter jurisdiction and failure to state a claim upon which relief can be based.

Further, Petitioner City of Henderson respectfully prays that a writ of certiorari be issued pursuant to 28 U.S.C. section 1254

and Rule 13 of the Rules of the Supreme court of the United States to review: (1) the order of the United States District Court for the District of Nevada dated July 2, 1992 which amended the order of March 22, 1992 by certifying the same for interlocutory appeal under 28 U.S.C. section 1292(b), and (2) the August 3, 1992 order of the United States Circuit Court of Appeals for the Ninth Circuit (Tang and Kuzinski) which denied the petition for permission to appeal pursuant to 28 U.S.C. section 1292(b).[1]

Finally, Petitioner City of Henderson respectfully prays that this Court issue its peremptory writ of mandamus under the All

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[1] Following this Court's denial of the first petition for writ of certiorari in No. 90-1771 on October 7, 1991, the federal civil rights action was submitted to the U.S. District Judge for decision on the trial briefs, with the City renewing its motion to dismiss for lack of subject matter jurisdiction under Huffman, supra, and also moving to dismiss on the concomitant grounds of res judicata and collateral estoppel under Migra v. Warren City School District Board of Education et al., 465 U.S. 75, 77, fn. 1 (1984), and University of Tennessee v.

(Footnote Continued)

Writs Act, 28 U.S.C. Section 1651, requiring the United States District Court to vacate and annul its March 22, 1991 order and to grant Petitioner's Motion to Dismiss the federal complaint on the grounds of lack of federal jurisdiction, and collateral estoppel and res judicata. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and University of Tennessee v. Elliott, 478 U.S. 788 (1986).

OPINIONS BELOW

A copy of the Henderson City Council Decision and Order dated April 16, 1990; U.S. District Court Orders, dated April 27, 1990, June 4, 1990, March 22, 1991, April 9, 1991, June 17, 1992, and July 2, 1992; and U.S. Court of Appeals Orders, dated May 2, 1991 and August 3, 1992, is set forth herein

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(Footnote Continued)
Elliott, 478 U.S. 788 (1986). Instead of rendering a decision on the merits of the lawsuit, U.S. District Judge Lloyd George, on his own motion, issued an order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would certify the same for interlocutory appeal pursuant to 28 U.S.C. section 1292(b).

at Appendices 1 through 10 to this Petition, and described as to content in the Index at page vi-vii.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1) and Rule 13 of this Court; see Supreme Court Practice, Stern, Gressman, and Shapiro, 6th Ed. at page 225-227; Estelle v. Gamble, 429 U.S. 97, 115 (1976); All Writs Act, 28 U.S.C. Section 1651, and Honorable Walter J. La Buy v. Howes Leather Co. et al., 352 U.S. 249 (1957).

CITY ORDINANCES INVOLVED

The text of Henderson Municipal Code sections 4.06.160; 4.04.150(a)(1), (3), and (4); 4.04.150(b)(2), (3), and (5); and 4.06 (entire section) is set forth at Appendix 11 herein.

STATEMENT OF THE CASE

In quasi-judicial administrative

proceedings, the City of Henderson City Council determined that the Federal Plaintiffs and Real Parties in Interest herein had committed fraud in applying for a revenue-based business license, and issued an order revoking their business license. [A business license will not issue unless the intended business operation is located in a proper zone.] See, in this regard, City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277, discussed herein at p. 41-42. Rather than appeal the City's action within the state court judicial system, as provided for by municipal ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") Section 4.06.160, attached hereto at Appendix 11], the Real Parties in Interest filed a 42 U.S.C. Section 1983 civil rights action in the United States District Court for the District of Nevada during the pendency of the state license revocation enforcement proceedings, seeking an injunction which would nullify the City Council's Order.

The federal civil rights action was initiated by the Real Parties in Interest as a defense to the ongoing state license revocation enforcement proceedings. The case is now again before this Court for review, this time on petitions for a writ of certiorari and a peremptory writ of mandamus, on both the jurisdictional issue and concomitant res judicata and collateral estoppel questions.

(A) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Seventeen years ago, as counsel of record for the Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), counsel of record for Petitioners herein contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over

the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to an extension of the Younger abstention doctrine to civil cases[2]. [See Younger v. Harris, 401 U.S. 37 (1971).]

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, the opinion decided the case solely on the basis

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[2] Huffman arose as an attack against a state court's final judgment determining the existence and abatement of a public nuisance and involved the use of real property. This type of suit was regarded at common law as being "in rem." In such an action, jurisdiction over the subject matter (i.e. the real property or the "res") could only be before one court at a time, and that rule was applied in cases involving the federal-state relationship.

On appeal, Appellant's primary argument had been that the trial court lacked jurisdiction to proceed with the federal civil rights action, filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the

(Footnote Continued)

of the Younger issue, without ruling explicitly that Younger was jurisdictional. His opinion remanded the case to the federal trial court for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional. While Justice Rehnquist's majority opinion did not address Appellant Huffman's primary "jurisdiction" contention, it did, however, underscore the fact that the Huffman Court was not suggesting "that the normal rules of res judicata and judicial estoppel do not

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(Footnote Continued)
previous day, November 30, 1972, and the state action and "res" were still "pending" in the state court during the time allowed for post-trial motions and until the appeal period had expired.

operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18.

Questions 1 and 2 of the Petitions herein raise the same two issues of "jurisdiction" and "estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record and Petitions herein place before this Court for summary resolution the identical "jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist, but not then before the Huffman Court for decision. Petitioner contends that in the intervening seventeen years, the "jurisdictional" basis of Huffman has been clearly established (see Point I at pp. 29-

38, herein), and the "res judicata/collateral estoppel" issue has been firmly resolved in University of Tennessee v. Elliott, supra (see Point II at pp. 38-46, herein). A peremptory writ of mandate ordering a dismissal of the federal civil rights action below under the All Writs Act should therefore issue on the simple authority of the Huffman and University of Tennessee cases, in order to prevent the City of Henderson from suffering the same kind of "irreparable harm" which flows from a "collateral" attack through the mechanism of a federal case which is improperly permitted to continue on the merits (see Point III at pp. 47-57, infra), and to prevent the U.S. District Court from issuing an opinion which is in conflict with the related final state decision (regarding the parties' rights arising out of the City's license revocation action), and advisory in nature in violation of Article III of the U.S. Constitution which bans issuance of advisory opinions by lower federal courts.

Further, to the extent that the Real

Parties in Interest's civil rights action attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989 (see Statement of Facts at page 12), such is barred by Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a city or state to have newly enacted legislation, containing a severability clause, construed initially by the state court system. [See Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a

revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a revenue based business license, indicating that their intended use of the property would be that of an "adult business." In applying for the business license, Federal Plaintiffs learned of the new provisions for sexually oriented

adult businesses, including the need to apply for a zone change or variance, and a request for a conditional use permit, to permit them to operate such a business at their specific location.

Federal plaintiffs were informed by the City that, under the applicable zoning provisions, the site they had rented was not then zoned for "adult use," and that if they wanted to operate an "adult use," they would have to request a variance or change in zoning.

Federal plaintiffs asked City officials if they could immediately open for business if they decided to operate a different use, such as a general video store (which was a separate and distinct use from and adult business under the new zoning code). They were told that their rented site was zoned for use as a general video store, but since this was a change in the described use in their business application form, they could qualify for issuance of a business under

that use only if they resubmitted their business license application and indicated their intention to open a general video store.

Federal plaintiffs did not apply for a zone change or variance or conditional use permit. Instead, they submitted an amended application for a business license, in which they intentionally and with knowledge of the substantive difference between the two categories, applied for permission to operate a business fraudulently described as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business."

In September of 1989, federal plaintiffs, on the basis of this intentional misrepresentation, were issued a revenue-based business license to operate a general video store on the Premises located at 1100 Boulder Highway, Henderson, Nevada, under the name "Fantasy

Video Plus."

The operation opened for business in or about February 1990. Although Federal Plaintiffs had represented to the City during the business license application process that the business use for "Fantasy Video Plus" would be that of a general video store, they operated the same as an "Adult Business." Federal plaintiffs admit in this action and have stipulated that since opening for business they have used the Premises for the continuous operation of a different business use,[3] i.e. that of an Adult Business.

When the licensees' deception came to the attention of the City inspectors, state enforcement action was commenced through the

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[3] An Adult Business is a business use separate and distinct from a general video store. In the course of making application for their business license, federal plaintiffs had been made aware that there was a substantive difference between the two uses (general video vs. Adult Business), and

(Footnote Continued)

filing of a complaint and the initiation of administrative license revocation proceedings against Federal Plaintiffs, which sought the revocation of the business license issued to the operation "Fantasy Video Plus," on the grounds that licensees had deliberately made fraudulent and material misrepresentations in their business license application in order to secure immediate issuance of the license. This state administrative enforcement action came before the City Council for hearing on April 10, 1990.

At the state license revocation proceedings, it was determined that federal plaintiffs' misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administra-

(Footnote Continued)
affirmatively assured the Community and Planning Departments' inspecting official that the business was not an "Adult Business" but was rather a general video business [see Paragraph 6 of Licensees' Answer to Complaint, filed before the Henderson City Council, at Appendix 1, herein].

tive proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues they now seek to relitigate in this federal civil rights action. (See Federal Plaintiffs' Answer to the City of Henderson Summons and Complaint before the City Council in license revocation proceedings, attached hereto at Appendix 1).

The administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license[4] and (2) stayed action to enforce the revocation for a period of ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action

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[4] The City, by its order dated April 16, 1989, revoked licensees' business license, but stayed enforcement action on the revocation, for a period of ten days, in order to allow the licensees an immediate and unfettered opportunity to have this revocation action reviewed by the state court, as provided by municipal ordinance.

before the City Council, as provided by the municipal licensing ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") 4.06.160]. A copy of the City Council's findings of fact, conclusions of law, and order is attached hereto at Appendix 2.

Instead of appealing the City Council's administrative factfinding and license revocation in state court, licensees filed this action in federal court as a defense to the City's enforcement action (which was pending because of the stay issued and the existence of a statutory right to appeal the City's action within the state judicial system), thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny[5].

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[5] To date, the U.S. District Court has not yet addressed: (1) the fact that the City Council's quasi-judicial order was pending at the time the federal lawsuit was filed, and (2) the City's claim that Younger/Huffman abstention precludes federal courts from intervening in pending state en-

(Footnote Continued)

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed. A copy of the Temporary Restraining Order and Preliminary Injunction is attached hereto at Appendix 3 and 4.

(footnote continued)
forcement actions, including quasi-judicial administrative procedures (as here), which involve important state interests, where an adequate state forum exists (whether invoked or not) in which to litigate federal plaintiffs' constitutional claims. Because Younger/Huffman rests on the federal court's lack of jurisdiction, it cannot be "waived" by the parties.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared herein their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit.

Defendants further requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine

applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

On March 22, 1991 (almost six months after Defendants herein had filed their motion to dismiss and request for an immediate hearing), the United States District Court herein filed its opinion and order which denied the Defendants' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. A copy of the March 22, 1991 Opinion and Order is attached hereto at Appendix 5.

On March 29, 1991, Defendants indicated to the United States District Court at a pre-trial conference that they intended to file a Motion in which they would request the Court to amend its order of March 22, 1991, so as to authorize an immediate appeal to the Ninth Circuit Court of Appeals and, if necessary, to the United States Supreme

Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's important state right to adjudicate issues regarding the State of Nevada and the City of Henderson's licensing procedures and the correctness of the quasi-judicial fact finding in which the City Council revoked the license of Fantasy Video Plus because of the use of fraud in obtaining the business license. United States District Court Judge Lloyd George, without ruling on Defendants' motion, indicated at said pre-trial conference that he wished to proceed quickly and hold the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal.

On April 1, 1991, Defendants filed their Motion to Amend re Interlocutory Order and Stay Proceedings. On April 9, 1991, Judge George entered an Order denying the Defendants' Motion to Amend his March 22

Order (to permit an interlocutory appeal). A copy of the April 9, 1991 Order is attached hereto at Appendix 6, herein.

On April 15, 1991, Defendants filed a Petition for writ of mandamus and request for a stay with the Ninth Circuit Court of Appeals. In the Petition for Mandamus, the City relied upon the jurisdictional issue which Huffman triggered, but did not argue the res judicata/collateral estoppel jurisdictional issue. On May 2, 1991, the Ninth Circuit issued an Order denying the petition and request for a stay. A copy of the May 2, 1991 Order is attached hereto at Appendix 7, herein.

On May 9, 1991, Defendants filed a petition for writ of certiorari with the United States Supreme Court, pursuant to Rule 13 of the Rules of the Supreme Court of the United States, together with an Application for Stay, addressed to the Honorable Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, pursuant to 28 U.S.C. 2101(e) and Rule 23 of the United States Supreme

Court Rules, requesting a stay pending final action on the Petition for Writ of Certiorari. On May 20, 1991, Associate Justice O'Connor denied this Application.

Pursuant to 28 U.S.C. section 2101(f) and Rules 22.5 and 23 of the Supreme Court Rules, Defendants then resubmitted their Application for Stay, addressed to Associate Justice Anthony M. Kennedy, together with a motion for an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. section 1651(a) and United States Supreme Court Rule 23.1. This reapplication relied on Associate Justice Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (9th Cir. 1987), which seemed to infer agreement with the Petitioner's contention that the United States Supreme Court had clarified Huffman, so as to require in a case such as this, a dismissal based upon lack of federal jurisdiction. Justice Kennedy referred said Application to the entire Court for action, which denied the

application on June 10, 1991.

Ultimately, the federal trial herein was continued to September 9, 1991.

On July 17, 1991, attorney Roger Jon Diamond, counsel for the federal Plaintiffs herein, sent a letter to Liza Conroy, Assistant City Attorney for the City of Henderson, which referred to the joint case conference report due in the related state case (City of Henderson v. Nevada Entertainment Industries, Clark County District Court No. A288647) (hereinafter "related state case"), and stated that state defendants would sign the report with the understanding that the Clark County District court case would not go to trial unless the City was successful in obtaining a dismissal of the pending federal case.

On August 9, 1991, the Scheduling Order in the related state case was filed, which set the matter for trial on the court's earliest available date beginning March 9, 1992.

On August 12, 1991, a Stipulation for

Order continuing the federal trial herein and Order thereon was filed, which continued the federal trial date herein from September 9, 1991, to January 6, 1992, with calendar call on January 2, 1992.

On October 7, 1991, the United States Supreme Court issued an Order denying the petition for writ of certiorari. On December 2, 1991, the United States Supreme Court denied a petition for rehearing.

Both Plaintiffs and Defendants filed trial briefs, and submitted the case for trial on the briefs. By stipulation, the evidentiary record from the state quasi-administrative proceeding was filed with the U.S. District Court and designated to be used as the evidentiary record before the United States District Court on trial of the final injunction[6].

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[6] Designation of the state record for use as the federal trial record demonstrates to what extent the federal action was a "relitigation" of the issues involved in the state case, and clearly establishes the

(footnote continued)

The City renewed its motion to dismiss for lack of subject matter jurisdiction, and also moved to dismiss on the grounds of res judicata and collateral estoppel. On June 17, 1992, the Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, signed an Order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would amend his prior order denying that request. The June 17th Order is attached hereto at Appendix 8. On July 2, 1992, the Court signed an order amending its prior Order of March 22, 1992 so as to certify the same for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b), a copy of which Order is annexed to this Petition at Appendix 9.

On August 3, 1992, the U.S. Court of Appeals for the Ninth Circuit denied the

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(footnote continued)
federal court's exercise of jurisdiction as presenting a "collateral" attack on the City Council's order, warranting use of the All Writs Act. See Statement of the Case, at pages 11-12, supra.

City's Petition for Permission to Appeal Pursuant to 28 U.S.C. section 1292(b) and F.R.A.P. Rule 5. See Appendix 10, attached hereto.

REASONS FOR GRANTING THE WRIT

Introduction

This Court should grant its writ of certiorari to resolve a recurring conflict in the relationship between the state and federal judicial systems relative to litigation containing a challenge to newly enacted state and municipal legislation dealing with important state interests. Watson v. Buck, 313 U.S. 387 (1941). The cost of government will be substantially diminished if Watson v. Buck, supra, is applied and a City has only the one state lawsuit to face, at which its newly enacted ordinance can be construed.

I

HUFFMAN V. PURSUE, LTD. IS APPOSITE; THE UNITED STATES DISTRICT COURT "LACKS (SUBJECT MATTER) JURISDICTION" AND MUST DISMISS THE CIVIL RIGHTS COMPLAINT.

In Huffman, this Court stated that federal courts, confronted with requests

to interfere with state civil functions, should abide by standards of restraint that go well beyond those of private equity jurisprudence. This point was underscored in the concurring opinion of then-Circuit Judge Kennedy in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, at 1084:

> "General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris (cite omitted) and Huffman v. Pursue, Ltd. (cite omitted)." (Our Emphasis).

The U.S. District Court's use of its injunctive powers and refusal to explain its unwillingness to apply Huffman abstention has clearly been improper and beyond its jurisdiction. The state license revocation enforcement proceedings were not tainted by bias, bad faith or harassment, and statutory appellate review was offered through the state court system (see H.M.C. Section 4.06.160 at Appendix 11 herein). Younger/Huffman abstention principles mandate that, since exceptional

circumstances creating a threat of irreparable injury both great and immediate do not exist in this case, the federal District Court was barred from intervening in the pending license revocation enforcement process.

Petitioner City of Henderson contends that for Younger/Huffman purposes, a municipal license revocation enforcement action is "pending" from the time it is initiated, until completion of the review process. The City of Henderson began the adjudicative process of enforcing its laws when it initiated the quasi-judicial administrative proceeding before the City Council, which resulted in a determination by the City Council that the Federal Plaintiffs' business license should be and was revoked because of fraudulent misrepresentations made in their business license application. The City Council stayed the enforcement of that revocation, in order to allow the licensees (federal plaintiffs herein) opportunity to pursue their right to judicial review by the

state of Nevada of the Henderson City Council's revocation of said business license. The availability of state judicial review created an adjudicative continuum which existed at the time Federal Plaintiffs' filed their federal complaint. See Alleghany Corp. v. Haase, 708 F.Supp. 1507 (W.D.Wis. 1989) at 1515-1519. The same Younger concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings, where state court review is available. Alleghany Corp. v. Haase, supra, at 1515. See also Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) at 639-640, citing World Famous Drinking Emporium, 820 F.2d 1079 (9th Cir. 1987) [Court found Federal Plaintiff clearly had unexhausted state appellate remedies where it had an opportunity to appeal decision of Board of Building Appeals through state judicial system, holding "there was therefore an on-going state proceeding in this case" at the time the federal complaint was filed and that the

Younger doctrine was applicable].

Moreover, after the federal plaintiffs filed their civil rights complaint, but before any proceedings of substance on the merits had taken place in the federal court (both the temporary restraining order and the preliminary injunction issued on the pleadings without the taking of additional testimony or evidence), the City filed its related federal declaratory judgment action which is pending in the state court [see page 29, supra], invoking Younger/Huffman abstention under the rule expressed in Hicks v. Miranda, 422 U.S. 332, 349-350 (1975).

At the time this Court articulated its opinion in Huffman, supra, amplifying the Younger abstention doctrine, it was not entirely clear as to what that Court meant by the term "jurisdiction" in its remand order in 420 U.S. 592, at 612, that the trial court was to consider whether it "may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind"

(see analysis of Huffman appeal at page 7 et seq., supra). Petitioner City of Henderson contends that this Court, in its subsequent decisions in Judice v. Vail, 431 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977); Moore v. Sims, 442 U.S. 415 (1979); Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Ohio Civil Rights Commission v. Dayton Christian Schools, 481 U.S. 1 (1986); and Penzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); has clarified Huffman, so as to require in a case such as this, a dismissal based upon lack of federal jurisdiction.

The above cases, decided subsequent to Huffman v. Pursue, Ltd., supra, made it abundantly clear that upon a valid Huffman challenge to jurisdiction, where a state court is available to render relief on important state interests, the federal court must dismiss the lawsuit on the grounds of lack of federal (subject matter) jurisdiction. See, in particular, Ohio Civil Rights Comm'n v. Dayton Christian School, supra,

which extended Younger to state administrative proceedings which, as here, are judicial in nature.

Federal plaintiffs herein had an "adequate state forum" in ongoing state proceedings in which they could have pursued the adjudication of all "constitutional questions" presented by their civil rights complaint, both by appealing the City Council's license revocation and enforcement action through the state court system, with ultimate review by the United States Supreme Court, and by pursuing the related state declaratory judgment lawsuit filed in the Nevada District Court.

The U.S. District Court below has not applied the Huffman rule as it was intended by the Huffman Court, and its action interfering with legitimate, time honored, license revocation enforcement proceedings and refusal to explain its reasoning in failing to apply Huffman is demonstrative of the extent to which lower federal courts have forgotten the Eleventh Amendment

rationale underpinning the Younger/Huffman abstention rule and past history.

Petitioner City of Henderson contends that, in a 42 U.S.C. Section 1983 civil rights action of this nature involving the Eleventh Amendment, where federal jurisdiction is predicated solely upon the "fiction" which has been created as to Ex Parte Young, 209 U.S. 123 (1908), once the fiction of Ex Parte Young has been destroyed, the jurisdiction of the federal court is exhausted. At that point, as here, where there has been a valid license revocation proceeding, the federal court is under the constraint imposed by the Tenth and Eleventh Amendments and has no power to "stay" its lack of jurisdiction and is required to dismiss the lawsuit. For the same reason, there can be no "reservation" of the federal question in the state court proceedings as has been permitted under England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). See, Allen v. McCurry, 449 U.S. 90, at 104, appearing herein at p. 57.

Associate Justice Anthony Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, at 1084 (9th Cir. 1987) appears to support the City's claim. Compare, Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989) at 120 ["We have held that where Younger abstention is applicable, 'a district court must dismiss the action.' World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079, 1081 (9th Cir. 1987), quoting Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353, 1356 (9th Cir. 1986)."]

At the time of the Huffman case, a federal civil rights action which sought nullification of a state law on constitutional grounds was recognized as a fertile area for causing friction with the Eleventh Amendment in the state-federal relationship, and such cases were clogging the federal docket. Safeguards at that time were procedural: (1) the 42 U.S.C. 1983 issue herein would have been heard by a 3-Judge

Court, (2) with a direct appeal to the United States Supreme Court, (3) under Court Appellate rules which required such "appeals" to be heard and decided by the United States Supreme Court. Further, the Younger and Huffman doctrines were engrafted onto the 3-Judge Court procedure to safeguard against interference with subject matter jurisdiction regarding the constitutionality of state laws, which more properly belongs in the state court system. When Congress was approached to do away with the 3-Judge Court, that legislative body was assured by Chief Justice Burger that the Younger and Huffman rules were adequate safeguards against federal interference with state subject matter jurisdiction. Such has not been the practice in the federal courts. To the extent that Huffman has not been viewed as being jurisdictional, such federal interference, as here, continues to abound.

II

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR THIS ACTION.

The actions taken by the City Council,

evidenced by the City Council's written Decision and Order, dated April 16, 1990, which:

(a) determined that the federal plaintiffs herein were guilty of fraud in securing a business license, and

(b) revoked plaintiffs' business license;

in conjunction with the doctrines of "res judicata" and "collateral estoppel" create an estoppel so as to preclude federal plaintiffs from pursuing this Civil Rights Action in Federal Court. See University of Tennesse v. Elliott, 478 U.S. 788 (1986); Migra v. Warren City School District Bd. of Education et al., 465 U.S. 75, at 77, fn. 1 (Jan. 23, 1984); and Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975). See also City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989).

This Court has held in University of Tennessee v. Elliott, supra, at 799. that where a state administrative body acting in a judicial capacity has resolved disputed

issues of fact properly before it, which the parties have had an adequate opportunity to litigate, federal courts in 42 U.S.C. Section 1983 civil rights cases must give that administrative body's factfinding the same preclusive effect to which it would be entitled in the State's courts. That holding applies in this case to the unreviewed factfinding and license revocation action taken by the City Council, acting in a judicial capacity. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277, quoted at p. 41, infra ["we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business license pursuant to the Las Vegas municipal code...."]. Even under the dissent of Justice Stevens, the record in the federal district court below should require the dissenting justices to apply the rule of law expressed in University of Tennessee to this case. See Justice Stevens opinion, at p. 800, fn.1:

"Moreover, in this case, and presumably

> in many other cases as well, even the section 1983 claim may be litigated in federal court, at least to the extent of determining whether the complainant was afforded a full and fair opportunity to litigate before the state administrative tribunal. See ante, at 799, n. 8, 92 L.Ed.2d , at 647." (Our Emphasis.)

The pivotal issue in the trial court below was the effect of the state administrative factfinding regarding the issue of "fraud" and license revocation. State governments have the right to require truthful disclosure of intended land uses from prospective commercial proprietors, and to have state enforcement action in this area of important state interest upheld. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277:

> "Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code. . . .
>
> Las Vegas characterized the entertainment provided by Nevada Industries

> as a "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case." (Our Emphasis.)

Federal plaintiffs are using this federal civil rights action to override the effect of the City Council's unreviewed quasi-judicial factfinding and license revocation order. Federal plaintiffs could have, but did not, obtain state judicial review (on an "abuse of discretion" standard) before the Eighth Judicial District Court of the specific questions of law which they had raised in their Answer [see H.M.C. 4.06.160.]. If federal plaintiffs wanted to nullify and reverse the City Council's decision and license revocation order, they were under an obligation to appeal the matter within the state court system, as provided by state law.

The fact that federal plaintiffs chose

not to seek state court review is immaterial. What is key is that: (1) federal plaintiffs had an opportunity to fully litigate all issues; (2) immediate state judicial review of said administrative action was available; and (3) the unreviewed City Council factfinding decision and order has now become final and fully enforceable under Nevada law. Said factfinding decision and order has a preclusive effect under Nevada law on federal plaintiffs constitutional claims asserted herein. Applying Nevada law, federal plaintiffs are now barred from "switching forums" and relitigating the question of the constitutionality of the regulatory scheme of the Henderson Municipal Code, having raised this specific question before in the prior state administrative proceeding [Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987)]. See the Second Affirmative Defense asserted in Licensees' Answer to Complaint, filed in administrative proceedings before the Henderson City Council in February 1990 at Appendix 1, herein.

This Court has held that judgments in state proceedings must be given both issue and claim preclusion effect to subsequent actions under 42 U.S.C. Section 1983 by federal courts. See Allen v. McCurry, 449 U.S. 90 (1980), at 104 ["There is...no reason to believe that Congress intended [section 1983] to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."]; Migra v. Warren City School District Board of Education, 465 U.S. 75, at 77 (1984) [Parties may not raise in federal court section 1983 litigation issues that could have been litigated in an earlier proceeding.] Both the Allen and Migra decisions support the view that Congress, in enacting the Reconstruction Civil Rights Statutes, did not intend to create an exception to general rules of preclusion, and these considerations apply to quasi-judicial

administrative actions where there has been an adequate opportunity to litigate. See University of Tennessee, supra, at pp. 796-799.

Moreover, a federal district court is without authority and has no jurisdiction to review final determinations of state judicial acts, because such review can only be conducted by the Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), reinvigorating the doctrine in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) [in which the Supreme Court established a jurisdictional rule which bars lower federal courts from reviewing state court judgments]. The Rooker/Feldman rationale is consistent with common-law rules of preclusion which apply to the factfinding decisions of state administrative bodies (as here) where adequate judicial review is available (see University of Tennessee v. Elliott, supra, at p. 799). Thus, Federal District Court review of the final determinations of the Henderson City Council

license revocation proceeding is barred.

III
THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED.

In Watson v. Buck, 313 U.S. 387 (1941), the U.S. District Court for the Northern District of Florida had enjoined a Florida State containing a severability clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, this Court held at pages 401-402 that a state statute which contains a severability clause must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort mights be made to apply it ... " before a federal court can interfere with the right of the state court to interpret such legislation.

In such a case it is reversible error for a federal court to grant an injunction and preempt the state court from its func-

tion, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights...." Further, under Watson v. Buck, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." Otherwise, the defenses must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the United States Supreme Court of federal questions. It is patent upon the face of the record below that the Watson v. Buck requirements of "irreparable loss"..."both great and immediate" have not been established.

(1) A NUMBER OF IMPORTANT STATE INTERESTS ARE INVOLVED

This federal case has impaired a number of important and compelling state interests and rights of the City of Henderson:

(1) The exercise of Home Rule

powers; i.e. to ensure that the license issuing and zoning process is kept free from the perpetration of material fraud by individual license and zoning applicants;

(2) The administration of state laws, to obtain compliance with the precise standards embodied in those laws, and to conduct the state enforcement process free from unwarranted federal interference which disrupts municipal efforts;

(3) The right not to have newly-enacted comprehensive municipal zoning ordinances subjected to federal judicial review to protect the legitimate interests which underlie state laws, until after the state court system has been given an adequate opportunity to review and interpret said laws and the issues are ripe for adjudication;

(4) To practice judicial economy by requiring that litigation involving the above judicial functions be conduc-

ted in the most efficient forum (i.e. the State Court);

(5) A quick, definitive determination of matters involving the operation of a business without a license. Such an activity constitutes a "per se" public nuisance and "per se" irreparable harm which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083.

(6) Suppression of fraud in the governmental license application process. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, infra, at p. 41-42. It is contrary to established public policy to obstruct state enforcement action against applicants who deliberately make false statements to the government in a business application in order to obtain a license.

(7) Control of the issuance and revocation of revenue-based business licenses, as part of a local revenue collection (taxation) scheme.

Unless effective, summary relief is accorded cities against such unlawful "collateral" appeals by this Court exercising its corrective power under the All Writs Act, the City of Henderson will sustain the same type of irreparable harm as that suffered by the state of Ohio in the Huffman case, and by other cities in similar cases, where important state laws are prevented from being presented to the state appeals courts and this Court for an authoritative construction of state law under the federal Constitution[7].

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[7] Because of the federal court interference with state appellate proceedings, in Huffman, the substantive appellate question involving application of state law (re "closure" of a public nuisance) was never decided, and could never be presented to this Court for definitive review. Huffman involved the power of a state court to close a 100% continuing public nuisance (obscenity) [utilizing a remedial approach acceptable under Red Light Abatement statutes, where the object is the reformation of property used to conduct a per se public nuisance (prostitution)]. Because a final state determination on this important legal issue, regarding the scope of available state remedies, was collaterally blocked by the federal courts in Huffman, an Ohio

(Footnote Continued)

(Footnote Continued)

appellate determination on "closure" was unavailable as a precedent for the state of Ohio and for other state court systems, and the substantive legal issue could not be reviewed by this Court, leaving the "closure" issue, to date, unsettled across the Nation.

The question of the extent to which the states may exercise the remedy of "closure" in connection with the exercise of their police power has arisen in other state cases, with varying results. See State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc. et al., 102 Idaho 451 (1982), jur. noted 454 U.S.1140 (1982), and app. dismissed 455 U.S. 1009 (1982), in which a unanimous State Supreme Court upheld the constitutionality of one-year closure provision and award of attorney fees against a pornographic bookstore. Compare, Jurisdictional Question #1 posed in the Petition for writ of certiorari in Cooper v. Mitchell Brothers Santa Ana Theater et al., No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90 (1981), and Jurisdictional Question #1 posed in Cooper v. Mitchell Bros. Santa Ana Theater et al., No. 82-345, October Term 1982, denied in 459 U.S. 944 (1982). Because the applicability of "closure" to the public nuisance abatement process involving pornographic outlets has never been answered by this Court, after a protracted, time-consuming and expensive abatement procedure in which it was demonstrated that the defendant Mitchell Brothers had engaged in the regular continuous exhibition of obscene films as a course of conduct continuing over a period of 10 years, the City of Santa Ana was forced to "throw in the towel" in 1987, and settled the controversy by paying defendants their attorney's fees and allowing their pornographic outlet to continue operations in Santa Ana.

(2) THE STATE COURT WITH A "DIRECT" ATTACK ON THE "PENDING" STATE ACTION PROVIDES A MORE EFFICIENT JUDICIAL FORUM FOR THE RESOLUTION OF DISPUTES THAN THE "COLLATERAL" CHALLENGES BEING ASSERTED IN THE FEDERAL COURT AGAINST THE STATE STATUTES AND CITY ORDINANCES IN SUCH "PENDING" CASES.

The exercise of federal jurisdiction striking a state statute or ordinance is not proper, except where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it." Watson v. Buck, 393 U.S. 387 (1941).

Without doubt, the U.S. District Court has jurisdiction in the instant case to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional and a state court action is pending, under Middlesex County Ethics

Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task routinely performed by state court.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that

> courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and do not function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory

construction is to save and not destroy."

In examining the record of this case, it is apparent that the state system is the most efficient and proper forum for interpreting the interplay of the state statutes and municipal ordinances involved. Were the constitutionality of the "conditional use" zoning laws an issue[8],

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[8] The constitutionality of the conditional use in the CH zone is not yet in issue, inasmuch as the federal plaintiffs never applied for a variance or a special use permit. Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (CA9, 1988); Ill. Commerce Comm'n v. Thompson, 318 U.S. 675, and National Bank v. Bd. of County Commissioners, 264 U.S. 450 (1924). When the conditional use ordinance is properly made an issue, the construction to be given the newly enacted legislation is one for the Nevada Courts, not the U.S. District Court. See Watson v. Buck, supra, discussed at pages 46 - 47, herein, and U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971) and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. Compare, in this regard, the construction given by California Courts to People v. Library One, Inc., 229 Cal.App.3d 873 (1989), and Thomas v. County of Los Angeles, 232 Cal.App.3d 916 (1991), re the effect of this Court's ruling in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) on specific time limits during which decision is required on permit applications, and note, in this regard, that the issue here is license revocation, not license procurement.

there is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied, and only a state court has both the right and duty to give the same a constitutional interpretation. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [4th Cir. 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S. Court of Appeals for further consideration in light of FW/PBS, 493 U.S. 215 (1990)].

The question as to whether a state statute is severable is more properly a matter for the state court. In a statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court

upholding the ordinance as being constitutional on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding the fact that this Court held the ordinance to be unconstitutional on its face[9]. See in this regard, Associate Justice White's opinion in Metromedia, Inc., announcing the judgment of the Court, at 521, fn. 26, wherein he addresses the issue of severability and the right of state courts in that regard.

IV

FEDERAL PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN THAT THEY HAVE FAILED TO PLEAD AND PROVE WHY THE PRINCIPLES ESPOUSED IN WATSON V. BUCK AND HUFFMAN V. PURSUE, LTD. DO NOT CONTROL SO AS TO REQUIRE A DISMISSAL FOR LACK OF FEDERAL JURISDICTION.

Under the rationale expressed in Allen

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[9] Unlike the "Humpty-Dumpty" approach of the federal court system (which cannot construe a state law), the superiority of the state forum is self-evident where the "egg" can immediately be put back together again.

v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527 (1981), Congress intended to establish federal jurisdiction under 42 U.S.C. Section 1983 where one of the following three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

Here, none of the foregoing apply. As noted by District Judge Young's analysis of Parratt, supra, in Juncker v. Tinney III, 549 F.Supp. 574, the Constitutional question may be interpreted as neither "abstention" nor "whether the plaintiff has exhausted his state judicial remedies," but rather whether the plaintiff has stated a claim upon which relief can be based. See also, Martinez v.

California, 444 U.S. 277 (1980).

In Vickory v. Walton, 721 F.2d 1062 (6th Cir. 1983), cert. denied in Vickory v. Walton, Sheriff, Butler County, No. 83-2111, 53 L.W. 3237 (1984), a majority of the Justices on a panel of the Sixth Circuit held that, under Parratt, supra, the plaintiff must attack the state corrective procedure as well as the substantive wrong and held that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. Applying the analysis and pleading requirement of the Sixth Circuit in Vickory v. Walton to the Statement of Facts herein, including the impact of the governing rule of law as expressed in Watson v. Buck on such facts, it is clear that Real Parties in Interest have neither alleged nor proven a cause of action under 42 U.S.C. Section 1983, and Petitioner City of Henderson was entitled to a judgment of dismissal for failure to state a claim upon which federal relief could be

granted.[6]

As a solution to this problem, Petitioner City of Henderson urges this Court to apply the Vickory v. Walton, supra, analysis to this case and adopt the same as a "heightened pleading" requirement of Constitutional law for those civil rights complaints which trigger abstention issues and implicate the abstention doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, supra. Compare, in this regard, the "heightened pleading" requirement of the Fifth Circuit, in Leatherman v. Tarrant County Narcotics Intelligence, 954 F.2d 1054 (5 Cir. 1992), cert. granted June 22, 1992, C.C.H. S.Ct. Bull. p. B3104.

Parratt bars Federal Plaintiffs from

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[6] Because Congress has created a specific remedy under 42 U.S.C. Section 1983, federal jurisdiction does not lie directly under the U.S. Constitution and the general grant of jurisdiction in 28 U.S.C. Section 1331(a), as in the case of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); see Carlson v. Green, 446 U.S. 14 at 18-19 (1980).

maintaining their federal civil rights action, because federal plaintiffs have been afforded adequate state remedies: both an appeal of the City Council action within the state court system and an opportunity for construction of relevant state laws in the related state declaratory judgment action. Thus they cannot show the requisite constitutional deprivation.

Further, federal plaintiffs have no fundamental right to do business as an "adult business" at their specific location, and thus are unable to show that they have suffered the loss of any constitutionally protected property interest. See Smith v. County of Los Angeles, 211 Cal.App.3d 188, 259 Cal. Rptr. 231 at 238 (June 5, 1989) where, in response to such a claim regarding an "adult" use and conditional use permit, the Court of Appeal, Second District, Division 7 held:

> "....To date, only four appellate decisions have held that a property owner had a 'fundamental vested right' in a land use matter. Each case involved classic vested rights

> and estoppel principles (cited cases omitted). No case has yet held, in the granting or denial of an application for variance or conditional use permit, that the decision affected a 'fundamental vested right.' In fact, the vast majority of cases considering an allegation of fundamental vested rights requiring exercise of independent judgment have rejected it. A sampling of these cases appears below in footnote 6."

The City's action in revoking federal plaintiffs' business license on the basis of federal plaintiffs' fraud imposes no restraint at all on federal plaintiffs' dissemination of particular materials, since they are free to carry on their business in a lawful fashion at another location. The fact that such locations may be difficult to find is immaterial. Arcara v. Cloud Books, Inc., 478 U.S. 697, at 705, fn. 2 (1986).

CONCLUSION

The Petition for writ of certiorari herein should be granted and relief accorded under the simple expediency of a peremptory writ of mandate issued under the All Writs Act, requiring the trial judge to dismiss the federal civil rights action on the

authority of Huffman v. Pursue, Ltd., supra, Watson v. Buck, supra, and University of Tennessee v. Elliott, supra.

It is a commonly known fact that the U.S. District of Nevada, is one of the most overloaded Federal Courts in the United States. Given that fact, and because such Court has requested instruction on the "jurisdiction" issue, this Court should inform and order that Court:

(1) that Huffman, supra, is jurisdictional;

(2) that the analysis of Vickory v. Walton, supra, should be applied to this case and that "heightened pleading" is required, since this civil rights complaint triggers abstention issues and implicates the abstention doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, supra. [Compare, in this regard, the "heightened pleading" requirement of the Fifth Circuit, in Leatherman v. Tarrant County Narcotics

Intelligence, 954 F.2d 1054 (5 Cir. 1992), cert. granted June 22, 1992, C.C.H. S.Ct. Bull. p. B3104.];

(3) that pursuant to the University of Tennessee rule of law, the federal civil rights action is barred by res judicata and collateral estoppel, because of the preclusive effect of the quasi-judicial administrative decision of the Henderson City Council under Nevada law; and

(4) that the federal court should act accordingly and unburden its docket by dismissing this case.

Dated: September 14, 1992

Respectfully submitted,

James J. Clancy
For Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of OCTOBER, 1992, three copies of the within Petition for a Writ of Certiorari were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the below listed parties to the proceedings and that all parties required to be served have been served:

The Honorable Lloyd D. George (1 copy)
United States District Court
District of Nevada
316 Federal Bldg. & U.S. Courthouse
300 Las Vegas Blvd. South
Las Vegas, NV. 89101

Solicitor General,
Department of Justice
Washington D.C. 20530

Neil J. Beller
301 East Clark Avenue, #760
Las Vegas, NV 89101
Attorney for Real Parties in Interest

Roger Jon Diamond
2115 Main Street
Santa Monica, CA. 90405
Attorney for Real Parties in Interest

Dated: OCTOBER 8, 1992

James J. Clancy

APPENDIX 1

CITY OF HENDERSON SUMMONS AND COMPLAINT, DATED FEBRUARY 7, 1990, SETTING HEARING BEFORE THE CITY COUNCIL ON FANTASY VIDEO PLUS' LICENSE REVOCATION HEARING, AND ANSWER OF FANTASY VIDEO PLUS THERETO.

[Reference: Petition for Writ of Certiorari at pages 5, 17, 18, and 43.]

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of Disciplinary Action Against The Business License of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	SUMMONS

THE CITY COUNCIL OF THE CITY OF HENDERSON SENDS GREETINGS TO:

NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS 1100 North Boulder Highway Henderson, Nevada 89015

YOU ARE HEREBY DIRECTED TO APPEAR, by serving upon the City Attorney, and by filing with the City Clerk of the City of Henderson City Council, your verified Answer to the Complaint attached hereto, stating whether or not you request a hearing, and admitting or

denying the facts alleged in the Complaint and by raising all legal and factual issues and defenses you desire the Council to consider, within ten (10) days after service hereof. Failure to file an Answer as required shall result in disciplinary action against you by default.

DATED this 7th day of February, 1990.

CITY OF HENDERSON CITY COUNCIL,
CLARK COUNTY, NEVADA

By_____
MAYOR

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	)	COMPLAINT

Comes now, the City of Henderson, by and through its attorney Shauna M. Hughes, Esq., City Attorney, and Liza Conroy, Esq., Assistant City Attorney, and as and for its causes of action alleges:

1. NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO, Licensees, d/b/a FANTASY VIDEO PLUS were issued a Gross Revenue Business License on the 21st day of September, 1989 for the location of 1100 North Boulder Highway, Henderson, Clark County, Nevada.

2. That on or about late July or early August 1989, an agent of licensees submitted an application for a retail video business which required the signature of an owner or corporate officer. An application was later returned, signed, with a description of the business. Said application is attached as Exhibit 1 hereto and incorporated by reference herein.

3. That pursuant to H.M.C. 4.04.020(d), the requirements of all departments and divisions must be met and approvals obtained.

4. That on or about August 31, 1989, an official of the Community and Planning Department went to the premises at 1100 N. Boulder Highway to inspect the premises known as Fantasy Video Plus to verify compliance with department requirements. The inspection official advised that proper zoning and a Use Permit were required for an "Adult

Business" pursuant to H.M.C. 19.24.004, Schedule C, Land Use Regulations.

5. That attached hereto as Exhibit -2 is the notice of requirements and corrections for business licensing issued to the licensees' agent advising of the zoning requirement.

6. That on or about September 1, 1989, licensees, or an agent of licensees, advised the Community and Planning Departments' inspection official that the business, Fantasy Video Plus, was not an "Adult Business" but a general video business with a minor area of the establishment to be devoted to adult entertainment.

7. That based upon the representations of licensees, or licensees' agent, said Community and Planning Department's inspection official approved the requirements and correction notice and forwarded same to the Business License Division.

8. That based upon licensees' business license application and receipt of approvals from all required inspections, the Business License Division issued a business license to Fantasy Video Plus.

9. That on or about February 1, 1990, an official from the Business License Division went to the premises and viewed the interior of the business finding that the nature of the business was predominately an adult, or sexually oriented, video, book, magazine and novelty store in contradiction to the description given in licensees' application and to the Community and Planning Department's inspection official.

WHEREFORE, the Business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS should be REVOKED for the following

grounds:

(a) Applicants must meet the requirements of all Departments or Divisions of the City and obtain approvals, H.M.C. 4.04.020(d).

(b) All business licenses issued are subject to suspension, limitation or revocation for failure of licensee, while engaged in the conduct of business, to comply with any provisions of the Henderson Municipal Code, H.M.C. 4.04.150(c).

(c) False or fraudulent statements in the application for the license constitutes good cause for revocation of the license, H.M.C. 4.04.150(a) (1), (3) (4); H.M.C. 4.04.150(b)(2),(3)(5).

DATED this 7th day of February, 1990.

DAVID G. LEE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID G. LEE, being first duly sworn according to law, deposes and says:

That he is the Administrator of Licensing of the City of Henderson Business License Division; that he has read the foregoing Complaint, knows the contents thereof, and that the same is true based upon information received by him in his official capacity.

DAVID G. LEE

SUBSCRIBED and SWORN to before me this 7th day of February, 1990.

NOTARY PUBLIC in and for said County and State.

SHAUNA M. HUGHES
CITY ATTORNEY
240 Water Street
Henderson, Nevada 89015

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON,

COUNTY OF CLARK, STATE OF NEVADA

In the Matter of the Disciplinary Action Against the Business License Of Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus.	))))))))	ANSWER TO COMPLAINT

Comes Now Nevada Entertainment Industries, Inc., Daniel Bishop and Francisco S. Villalpando d/b/a Fantasy Video Plus, and respond to the Complaint as follows:

1. Admit that Nevada Entertainment Industries, Inc., d/b/a Fantasy Video Plus, licensee, was issued a gross revenue business license on the 21st day of September 1989 for the location of 1100 North Boulder Highway, Henderson, Clark County, Nevada. Deny that Daniel Bishop and Francisco S. Villalpando received any licenses.

2. Admit that on or about late July or early August 1989 an agent of Nevada Entertainment Industries, Inc. submitted an application for retail video business which required the signature of an owner or corporate officer. Admit that an application was later returned, signed by Daniel Bishop, with a description of the business. Admit that Exhibit 1 to the Complaint is a copy of the application which was submitted by Bishop.

3. Admit that Henderson Municipal Code Section 4.04.020(d) states what it purports to state. Deny the remaining allegations of paragraph 3.

4. Admit that on August 31, 1989, an official of the Community and Planning Department of the City of Henderson went to the premises at 1100 North Boulder Highway to inspect the premises known as Fantasy Video Plus to verify compliance with department requirements. Admit

that the inspection official advised that proper zoning and a use permit were required for "adult business" pursuant to Henderson Municipal Code Section 19.24.004, Schedule C, Land Use Regulations.

5. Admit that attached to Complaint as Exhibit 2 is a document known as "Requirements and Corrections for Business Licensing."

6. Admit that on or About September 1, 1989, Daniel Bishop advised the Community and Planning Departments' inspection official that the business, Fantasy Video Plus, was not an "adult business" but rather a general video business. Deny each and every remaining allegation of Paragraph 6.

7. Admit that the Community and Planning Departments' inspection official approved the Requirements and Correction notice and forwarded same to the Business License Division. Deny

each and every remaining allegation of Paragraph 7.

8. Admit that the Business License Division issued a business license to Fantasy Video Plus. Deny, for lack of information or belief, the remaining allegations of Paragraph 8.

9. Admit that on or about February 1, 1990 an official from the Business License Division went to the premises and viewed the interior of the business. Deny the remaining allegations of Paragraph 9.

FIRST AFFIRMATIVE DEFENSE

Fantasy Video Plus at 1100 North Boulder Highway is not an adult business within the meaning of the Henderson Municipal Code.

SECOND AFFIRMATIVE DEFENSE

The regulatory scheme of the Municipal Code of the City of Henderson is unconstitutional in violation of the First and Fourteenth Amendments to the

United States Constitution. The ordinance is too vague and does not provide a procedure for the prompt issuance of the necessary permits and licenses. For example, Henderson Municipal Code Section 19.24.004, Schedule C authorizes an adult business in the CH zone but imposes additional use regulations. In particular, an adult business is allowed in the CH zone, wherein the property is located, with a provision that a use permit be obtained and also with a provision that it be subject to local requirements set forth in the licensing regulations of the Henderson Municipal Code. In order to obtain a use permit, Section 19.74.012(A) requires that the City Council and Commission find, among other things, that the proposed location of the use and the proposed conditions under which it would be operated ... will not be detrimental to the public

health, safety or welfare of persons residing or working in or adjacent to the neighborhood of such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City . . . ." These standards are too vague to withstand constitutional scrutiny. See e.g., FW/PBS v. Dallas, ___ U.S. ___ (January 9, 1990).

THIRD AFFIRMATIVE DEFENSE

The alleged misrepresentation was not material; had the disclosure been made that the City now asserts should have been made, the necessary license would nevertheless have issued.

WHEREFORE, Fantasy Video Plus prays that the Complaint be dismissed and that its license not be suspended or revoked.

To the extent the City wishes to conduct hearings and require permits and licenses, Nevada Entertainment Industries, Inc. prays that the

appropriate City departments, Commissions, and officers conduct the necessary hearings and then grant the required permits and licenses.

A hearing is hereby requested.

Dated this ____ day of February, 1990.

NEVADA ENTERTAINMENT
INDUSTRIES, INC.

By: _____
DANIEL BISHOP

_____
DANIEL BISHOP

_____
FRANCISCO S. VILLALPANDO

MY COMMISSION EXPIRES JAN 30, 1994
STATE OF WISCONSIN COUNTY OF
KENOSHA

DANIEL BISHOP CAME BEFORE ME ON
FEB. 16, 1990

_____
BARBARA A. ROSS

APPENDIX 2

CITY COUNCIL DECISION AND ORDER, DATED APRIL 16, 1990, REVOKING THE BUSINESS LICENSE OF NEVADA ENTERTAINMENT INDUSTRIES, INC. d.b.a. FANTASY VIDEO PLUS FOR FRAUD IN THE BUSINESS APPLICATION AND STAYING ENFORCEMENT FOR TEN (10) BUSINESS DAYS TO ALLOW AN APPEAL TO THE NEVADA DISTRICT COURT.

[Reference: Petition for Writ of Certiorari at pages 5 and 19.]

BEFORE THE CITY COUNCIL OF THE CITY OF HENDERSON

COUNTY OF CLARK, STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to

operate as an adult video business, the licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the

business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issue at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby

revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAYEN

_____
CARLTON LAWRENCE

ATTEST:

_____
DOROTHY VONDENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

UNITED STATES DISTRICT COURT'S TEMPORARY RESTRAINING ORDER ENTERED ON APRIL 27, 1990 RESTRAINING ENFORCEMENT OF THE CITY COUNCIL ORDER DATED APRIL 16, 1990 AND THE CITY'S LICENSING AND ZONING ORDINANCES AS THEY APPLY TO FANTASY VIDEO PLUS.

[Reference: Petition for Writ of Certiorari at pages 5 and 20.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG [ENTERED APRIL 27, 1990 Clerk, U.S. Dist. Court, Dist. of Nevada By ____Deputy]

ORDER

This matter is before the court on plaintiffs' motion for a temporary restraining order (#2) pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs currently operate an adult bookstore within the City of Henderson. Based upon alleged discrepancies in plaintiffs' license application, the City has revoked plaintiffs' license as of May 1, 1990. Plaintiffs challenge the constitutionality of defendants'

licensing and zoning schemes as applied to their adult entertainment business. Plaintiffs assert that these schemes violate their First and Fourteenth Amendment Rights.

Both plaintiffs' and defendants' counsel presented oral arguments on April 27, 1990. Upon review of the record and consideration or oral arguments, the court finds that a temporary restraining order is warranted. Plaintiffs will suffer substantial hardship and possible irreparable harm if their business is closed and if they are unable to exercise their First Amendment rights. See Ebel v. City of Corona, 698 F.2d 390, 393 (9th Cir. 1976). Furthermore, plaintiffs raise substantial questions regarding the validity of the City's ordinances. Thus,

IT IS HEREBY ORDERED, that plaintiffs application for a temporary

restraining order (#2) is granted.

IT IS FURTHER ORDERED, defendants,and each of them, their officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them or under their direction, supervision and control, are restrained and enjoined, pending the termination of this order, from:

(a) Closing down plaintiffs' business at 1100 Boulder Highway, Henderson, NV., or arresting, and/or citing or prosecuting, plaintiffs or any of their employees for allegedly violating the provisions of the Henderson Municipal Code regarding business licenses, zoning or conditional use permits;

(b) Revoking plaintiffs' business license issued on September 21, 1989;

(c) Enforcing Ordinance No. 1160;

(d) Enforcing the ordinances of the City of Henderson regarding business licenses, conditional use permits, or zoning, as they apply to plaintiffs' bookstore and arcade at 100 Boulder Highway, Henderson, NV.

IT IS FURTHER ORDERED, that plaintiffs post a $10,000 bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED, that the preliminary injunction hearing set for May 4, 1990 is vacated, and the hearing is rescheduled for June 1, 1990 at 1:30 p.m. in courtroom number 3.

IT IS FURTHER ORDERED, that defendants' opposition to plaintiffs' motion for preliminary injunction shall be filed by 4:00 p.m. on May 14, 1990, and if plaintiffs wish to file a reply brief, they shall file it by 4:00 p.m.

on May 25, 1990.

DATE: 27 April 1990

LLOYD D. GEORGE
United State District
Judge

APPENDIX 4

UNITED STATES DISTRICT COURT'S PRELIMINARY INJUNCTION ENTERED ON JUNE 4, 1990, ENJOINING ENFORCEMENT OF THE CITY COUNCIL ORDER DATED APRIL 16, 1990 AND THE CITY'S LICENSING AND ZONING ORDINANCES AS THEY APPLY TO FANTASY VIDEO PLUS.

[Reference: Petition for Writ of Certiorari at pages 5 and 20.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES INC., et al.,	)	CV-S-90-264-LDG
Plaintiffs,	)	[ENTERED JUNE 4, 1990 Clerk, U.S. Dist. Court, Dist. of Nevada By_____Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

This matter is before the court on plaintiffs' motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs operate an adult theater and bookstore located in the City of Henderson. The City requires that such businesses locate within a "CH" zone. Furthermore, in order to operate the business, the City requires that plaintiffs obtain a business license and a use permit. Plaintiffs applied for

and received a business license based upon the following description: "Mass media books and video store, novelty shop, etc." Upon the opening of the business in February 1990, the City moved to revoke the license since it misrepresented the nature of plaintiffs' business. Plaintiffs contends that the license is not fraudulent. More importantly, plaintiffs contend that the license and use permit ordinances are facially invalid since they vest too much discretion in the hands of city officials in violation of plaintiffs' First and Fourteenth Amendment rights. Although the City Council voted to revoke the license, this court granted a temporary restraining order on April 27, 1990. On June 1, 1990, this court heard oral arguments on the motion for a preliminary injunction.

The standard for granting a preliminary injunction is clear. A

plaintiff must show probable success on the merits and irreparable injury. Ebel v. City of Corona, 698 F.2d 390, 392 (9th Cir. 1983). In the alternative, a plaintiff must show the existence of serious questions regarding the merits and that the balance of hardships tips sharply in his favor. Id.

As for the harm element, the court recognizes that the City suffers a certain amount of harm whenever a court prevents the enforcement of a regulatory scheme. However, plaintiffs have invested time and money into their business, and they have operated their business for some four months. Plaintiffs would suffer economic loss if the court forces them to close their business pending the resolution of this matter. Although plaintiffs do not have a use permit, plaintiffs have not violated any other ordinance, and the business sits within a CH zone.

Furthermore, the court noted in Ebel that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' Eldrod v. Burns, 427 U.S. 347 . . . (1976)." 698 F.2d at 393. Thus, plaintiffs must prevail on both the irreparable injury and the balance of hardships prong of the test.

Both parties agree that the City has the power to enact business license and zoning requirements. The court recognizes that City has valid regulatory interests. The Supreme Court has upheld zoning requirements which purport to limit the locations available for adult theaters and stores. See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976). However, the City's ordinances appear to go beyond neutral time, place and manner regulations which allow alternative

means of communication. The ordinances allow officials to deny applications for licenses and permits based upon factors such as the general welfare or, in the case of a license, for any just or equitable reason. As the Supreme Court noted in Staub v. City of Baxley, 355 U.S. 313, 322 (1958),

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of any official-as by requiring a permit or license which may be granted or withheld in the discretion of such official-is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

The Supreme Court recently quoted this language with approval in FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990). Such discretionary power may result in impermissible censorship and arbitrary suppression. A review of the ordinances suggests that officials have unbridled discretion in granting licenses and

issuing permits. At this time, the court has no authoritative indication of how an official's discretion may be limited. Thus, the court believes that plaintiffs have raised serious questions regarding the validity of the ordinances as applied to their business. This factor coupled with the fact that the balance of hardships favors plaintiffs calls for the issuance of the preliminary injunction. Consequently,

IT IS HEREBY ORDERED, that plaintiffs' motion for a preliminary injunction is granted.

IT IS FURTHER ORDERED, defendants, and each of them, their officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them or under their directions, supervision and control, are restrained and enjoined, pending the termination of this order, from:

(a) Closing down plaintiffs' business at 1100 Boulder Highway, Henderson, NV., or arresting, and/or citing or prosecuting, plaintiffs or any of their employees for allegedly violating the provisions of the Henderson Municipal Code regarding business licenses, zoning or conditional use permits;

(b) Revoking plaintiffs' business license issued on September 21, 1989;

(c) Enforcing Ordinance No. 1160 against plaintiffs;

(d) Enforcing the ordinances of the City of Henderson regarding business licenses, conditional use permits, or zoning, as they apply to plaintiffs' bookstore and arcade at 100 Boulder Highway, Henderson, NV.

IT IS FURTHER ORDERED, that

plaintiffs maintain a $20,000 bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED, that defendants supply the court with the full text of all applicable Henderson ordinances prior to the trial on this matter.

DATE: 4 June 1990

LLOYD D. GEORGE
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT'S ORDER AND OPINION ENTERED MARCH 22, 1991, DENYING THE CITY'S MOTION TO DISMISS THE CIVIL RIGHTS LAWSUIT ON THE GROUNDS OF LACK OF FEDERAL JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE BASED AND REFUSING TO ISSUE AN ORDER TO SHOW CAUSE WHY THE FEDERAL PLAINTIFFS SHOULD NOT BE REQUIRED TO PRESENT THEIR FEDERAL CLAIMS IN THE STATE DECLARATORY JUDGMENT LAWSUIT.

[Reference: Petition for Writ of Certiorari at pages 5 and 22.]

UNITED STATE DISTRICT COURT
DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al.,	)	CV-S-90-264-LDG (LRL)
Plaintiffs,	)	[ENTERED MAR. 22, 1991 Clerk, U.S. Dist. Court, Dist. of Nevada By___Deputy]
v.	)	
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

Plaintiffs have filed this action pursuant to 42 U.S.C. Section 1983 and allege a deprivation of their constitutional rights. Plaintiffs operate an adult theater and bookstore located in the City of Henderson. The City requires that such businesses locate within a "CH" zone. Furthermore, in order to operate the business, the City requires that plaintiffs obtain a business license and a use permit.

Plaintiffs applied for and received a business license based upon the following description: "Mass media books and video store, novelty shop, etc." Upon the opening of the business in February 1990, the City moved to revoke the license since it misrepresented the nature of plaintiffs' business. Plaintiffs contend that the application was not fraudulent. More importantly, plaintiffs contend that the license and use permit ordinances are invalid since they vest too much discretion in the hands of city officials in violation of plaintiffs' First and Fourteenth Amendment rights. Although the City Council voted to revoke the license, this court granted a temporary restraining order on April 27, 1990. After hearing oral arguments, this court granted a preliminary injunction on June 5, 1990. On October 1, 1990, the City filed a complaint for

declaratory judgment and injunctive relief in a Nevada state court. This matter is currently before the court on defendants' motion to dismiss (#24).

The City believes that the parties should adjudicate this dispute in state rather than federal court. However, this court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 350, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986). In general, abstention is inappropriate when extensive rather than a single adjudication would be required by a state court. Harris County

Commissioners Court v. Moore, 420 U.S. 77, 86 n.9 (1975) (citing Baggett, 377 U.S. at 378). The various licensing and regulatory ordinances involved in this litigation do not readily lend themselves to a single state court adjudication. The obligations imposed by the ordinances rather than the applicability of the ordinances are at issue.

The City seeks abstention based upon the principles contained in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Huffman followed the abstention principles formulated in Younger v. Harris, 401 U.S. 37 (1971) which generally preclude a federal court from intervening in a pending state criminal prosecution. Id. at 41. Huffman required the Court to consider whether Younger "bars a federal court from intervening in a state civil proceeding such as this, when the proceeding is

based on a state statute believed by the district court to be unconstitutional." Huffman, 420 U.S. at 594. In Huffman, the owner of an adult theater challenged attempts by Ohio authorities to invoke the state public nuisance statute. A state court determined that the owner had displayed obscene movies and should be closed pursuant to the statute. Rather than file a direct appeal, the owner filed a federal action pursuant to 42 U.S.C. Section 1983 alleging that the use of the statute constituted a deprivation of constitutional rights under color of state law. Id. at 598. The Supreme Court held that Younger did bar federal action. The Court found that "[t]he state is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statues which prohibit the dissemination of obscene materials." Id. at 604.

However, the court stated that "we need make no general pronouncements upon the applicability of Younger to all civil litigation." Id. at 607. Although subsequent cases have applied Younger to other civil litigation, the Court has never adopted a rule that Younger applies to all civil litigation. See, e.g., Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).

Upon a review of the record, it is clear that the principles of Younger and Huffman should not apply to this litigation. Huffman can be distinguished in several important respects. Unlike Huffman, this litigation involves more than simply an application of state nuisance laws. In Huffman, a court had already determined

that the theater was showing obscene materials, but no such determination has been made in this case. Although obscenity is outside the scope of the First Amendment, some adult materials are afforded First Amendment protection. See Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir.), cert. denied, 110 S.Ct. 59 (1989). Perhaps most importantly, the federal complaint in Huffman was filed in the midst of on-going state litigation.

Before invoking the principles of Younger and Huffman, a state action must exist. As the Supreme Court stated,

> [w]hen no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Huffman, 420 U.S. at 885 (quoting

Steffel Thompson, 415 U.S. 452, 462 (1974). This requirement is not met simply by filing a federal action first. As the Supreme Court noted in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984), "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." See also Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350-51 (9th Cir. 1985). Thus, we must examine whether "proceedings of substance on the merits" took place in this court prior to the filing of the state action. In Hawaii Housing Authority, the Court stated that "[a] federal court action in which a preliminary injunction is granted has

proceeded well beyond the 'embryonic stage,' [Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975)], and considerations of economy, equity, and federalism counsel against Younger abstention at that point." 467 U.S. at 238. In the present case, this court issued the preliminary injunction some four months prior to the filing of the state court action. Thus, based on the above analysis, the court finds that abstention is not proper.

Additionally, a plaintiff need not exhaust available state remedies prior to bringing a federal action pursuant to Section 1983. The Supreme Court has recognized that "[w]hen federal claims are premised on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3) . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to

protect constitutional rights." Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). The Supreme Court established a limited exception in Parratt v. Taylor, 451 U.S. 527 (1981). In Parratt, an inmate alleged that a state official's negligence deprived him of property without due process. The Court required the claimant to exhaust his state remedies which would fully compensate him for his monetary loss. Id. at 544. However, requiring state court exhaustion of all Section 1983 claims would be contrary to Congressional intent. See Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 508 (1982). Finally, the court does not believe that the Henderson Municipal Code compels a party to take their dispute to state court. Section 4.06.160 provides that "[a]ny person aggrieved by final decision or order of the City Council . . . may obtain a

judicial review . . . in the Eight Judicial District Court." This section is written with permissive rather than mandatory language. Thus,

IT IS HEREBY ORDERED, that defendants' motion to dismiss (#25) is denied.

IT IS FURTHER ORDERED, that defendants' application to show cause (#24) is denied.

DATE: 20, March 1990

LLOYD D. GEORGE
United States District
Judge

APPENDIX 6

UNITED STATES DISTRICT COURT'S ORDER DATED APRIL 9, 1991, WHICH DENIED THE CITY'S MOTION TO CERTIFY AN INTERLOCUTORY APPEAL OF THE REFUSAL TO DISMISS THE CIVIL RIGHTS LAWSUIT.

[Reference: Petition for Writ of Certiorari at page 5 and 24.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES INC., et al.,	)	
Plaintiffs,	)	CV-S-90-264-LDG (LRL)
v.	)	[ENTERED APRIL 9, 1991 Clerk, U.S. Dist. Court, Dist. of Nevada By ____Deputy]
CITY OF HENDERSON, et al.,	)	
Defendants.	)	

ORDER

On March 22, 1991, this court entered an order denying defendant City of Henderson's motion to dismiss. Henderson had contended that this court should allow a Nevada state court to review this matter. Upon denial of the motion, Henderson has filed this motion to amend interlocutory order and stay proceedings (#31). Henderson basically asks the court to certify its order for an interlocutory appeal. Pursuant to 28

U.S.C. Section 1292, a district court may certify such an appeal if the order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of the litigation. Based upon a review of the record, the court does not believe that an interlocutory appeal is warranted. In particular, the court fails to find a substantial ground for difference of opinion. This court's rationale is adequately stated in its March 22 order. Additionally, this matter can be quickly resolved after a brief trial. As noted at the March 29, 1991 conference, the court believes the better course is to proceed to trial immediately, and then allow for appropriate appellate review of all questions. Depending upon the outcome at trial, Henderson may no longer desire any review. Thus,

IT IS HEREBY ORDERED, that Henderson's motion to certify an interlocutory appeal (#31) is denied.

DATE; 9 APRIL, 1991

/s/
LLOYD D. GEORGE
U.S. District Judge

APPENDIX 7

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ORDER FILED MAY 2, 1991 DENYING CITY'S PETITION FOR WRIT OF MANDAMUS AND APPLICATION FOR A STAY OF DISTRICT COURT PROCEEDINGS.

[Reference: Petition for Writ of Certiorari at pages 5 and 24.]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF HENDERSON, NEVADA, et al.,	No. 91-70233
Petitioners,	DC# CV-S-90-264-LDG-L Nevada (Las Vegas)
vs.	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,	ORDER
Respondent,	FILED May 2, 1991 CLERK, U.S. COURT OF APPEALS
and	
NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Real Parties in Interest.	

Before: NORRIS, BEEZER and O'SCANNLAIN, Circuit Judges

The petition for writ of mandamus is denied. Petitioners' request for a stay of district court proceedings pending disposition of the petition is denied as moot.

APPENDIX 8

UNITED STATES DISTRICT COURT'S ORDER DATED JUNE 17, 1992, INDICATING THE COURT HAD RECONSIDERED DEFENDANTS' REQUEST FOR AN EXPEDITED APPEAL ON THE JURISDICTIONAL ISSUE, AND WOULD AMEND THE COURT'S PRIOR ORDER DENYING SAID REQUEST.

[Reference: Petition for Writ of Certiorari at pages 5 and 28.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP, Plaintiffs, v. CITY OF HENDERSON, JAMES GOFF, Defendants.	CV-S-90-264-LDG (LRL) [ENTERED AND SERVED JUN 18, 1992 CLERK, U.S. DISTRICT COURT, DISTRICT OF NEVADA BY /S/ DEPUTY

ORDER

This matter has been submitted for trial on the briefs. Unfortunately, although the parties have stipulated that the case can be tried in this summary fashion, they completely disagree about what the main issues are. The court will attempt to summarize their respective positions.

1. The plaintiffs' position

The plaintiffs in this suit are operators of an adult video/novelty shop in Henderson. They claim that the City of Henderson is trying to close them down because of the nature of their

business, in violation of the First Amendment. In fact, the Henderson City Council did revoke the plaintiffs' business license, but that revocation was stayed by order of this court, pending the outcome of this lawsuit.

The plaintiffs argue that the statutes under which they must apply for and hold a business license and other necessary documents in Henderson are written in such a way as to give city administrators impermissibly broad discretion to arbitrarily deny the plaintiff permission to conduct business. In their brief the plaintiffs outline the relevant statutory scheme, which does, according to the cases cited by the plaintiffs, appear to give city administrators constitutionally overbroad discretion to deny and/or revoke business licenses. The main issue in this case, in the plaintiffs' view, is the constitutionality of this statutory scheme.

2. <u>The defendant's position</u>

The defendants, in their brief,

fail to even address the plaintiffs' constitutional arguments. Instead, they contend mainly that the court should abstain from exercising jurisdiction over this suit because of a pending state action (which was filed by the defendants after this suit was well under way). The defendants have lost on this issue twice before, once on a motion for a preliminary injunction and again on a motion to dismiss. Nevertheless, forty-six (46) pages of their forty-eight (48) page brief are devoted to abstention. In the remaining two (2) pages, the defendants contend that the plaintiffs' business license was revoked for fraud, not because of the nature of the plaintiffs' business. The constitutionality of the statutory scheme discussed by the plaintiffs is never even addressed.

3. Disposition

The case cannot be finally determined on the basis of these briefs. The defendants make no defense to the plaintiffs' attack on the

constitutionality of the Henderson statutes, but instead spend most of their time arguing issues the court has already decided. And the plaintiffs have not responded to the defendants' factual contention that the plaintiffs' business license was revoked because of their own fraud, not because of the nature of their business.

The defendants have once before asked for leave of the court to certify the court's order denying their motion to dismiss for interlocutory appeal, pursuant to 28 U.S.C. Section 1292(b), on the question of the court's subject matter jurisdiction. See motion (#31). Such an appeal would eliminate the abstention issue from this case. Even though the court denied the defendants' previous request, it now finds that it would materially advance the ultimate termination of this litigation to allow this issue to be appealed in interlocutory fashion to the circuit, so that the issue may be eliminated and the

parties can then, if the court's ruling is upheld, focus on the constitutionality of the statute in question.

Accordingly, for the reasons above stated,

IT IS ORDERED that the court's order (#29) denying the defendants' motion to dismiss (#25) is hereby certified, pursuant to 28 U.S.C. Section 1292(b), for interlocutory appeal on the issue of this court's subject matter jurisdiction over this lawsuit;

IT IS FURTHER ORDERED that the defendants shall have ten (10) days from the date this order is entered to take such an appeal;

IT IS FURTHER ORDERED that this action is hereby stayed until resolution of the defendants' interlocutory appeal.

DATE: 17 JUNE 1992

/S/
LLOYD D. GEORGE
UNITED STATES DISTRICT JUDGE

APPENDIX 9

UNITED STATE DISTRICT COURT'S ORDER DATED JULY 2, 1992, AMENDING ITS PRIOR ORDER OF MARCH 22, 1992, SO AS TO CERTIFY THE SAME FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b).

[Reference: Petition for Writ of Certiorari at pages 5 and 28.]

LIZA CONROY,ESQ.
Assistant City Attorney
240 Water Street, #205
Henderson, NV 89015
702-565-2083

Nevada State Bar No. 001507
Attorney for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP, Plaintiffs, -vs- CITY OF HENDERSON, a Nevada municipal corporation, JAMES GOFF, Chief of Police of the City of Henderson, Defendants.	No.CV-S-90-264-LDG-LRL ORDER AMENDING INTERLOCUTORY ORDER AND STAY PROCEEDINGS

Pursuant to the Court's Order, dated June 17, 1992 and entered June 18, 1992, for the reasons stated in the Order, and pursuant to 28 U.S.C.A. Section 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure which require the inclusion of certain statements necessary for a petition for permission to appeal, it is

ORDERED that the order denying Defendants' motion to dismiss and Defendants' application to show cause, entered March 22, 1991, herein is hereby amended to include as concluding paragraphs:

"This order involves a controlling question of law as to which there is substantial ground for difference of opinion, and

"An immediate appeal from this order may materially advance the ultimate termination of this litigation."

IT IS FURTHER ORDERED that said order denying Defendants' motion to dismiss and Defendant's application to show casue, entered March 22, 1991, herein, as amended, shall be deemed entered as of the date indicated below for purposes of computing the allowable time for the filing of a petition for permission to appeal, and for this purpose only.

IT IS FURTHER ORDERED that the proceedings herein be stayed until such time as a petition for leave to appeal pursuant to 28 U.S.C.A. Section 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure can be filed with and acted upon by the Court of Appeals, and, if allowed, until a final judgment has been entered on such appeal.

IT IS SO ORDERED:

/S/

UNITED STATES DISTRICT JUDGE

DATED: 2 JULY, 1992

APPENDIX 10

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ORDER DATED AUGUST 3, 1992, DENYING DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b) AND FEDERAL RULES OF APPELLATE PROCEDURE, RULE 5.

[Reference: Petition for Writ of Certiorari at pages 5 and 29.]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al. Plaintiff-Respondent,	NO. 92-80218 DC# CV-5-90-264-LDG Nevada (Las Vegas)
	ORDER
vs.	[FILED AUG. 3, 1992 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS]
CITY OF HENDERSON, a Nevada Municipal corporation, et al., Defendant-Petitioner.	

Before: TANG and KOZINSKI, Circuit JUDGES

The petition for permission to appeal pursuant to 28 U.S.C. Section 1292(b) is denied.

APPENDIX 11

HENDERSON MUNICIPAL CODE, SECTIONS 4.04.150(a)(1),(3), AND (4); SECTIONS 4.04.150(b)(2),(3), AND (5); AND SECTION 4.06 (ENTIRE SECTION).

[Reference: Petition for Writ of Certiorari at pages 5, 6, and 30.]

4.04.150 DENIAL, NONRENEWAL, SUSPENSION, LIMITATION AND REVOCATION OF LICENSES:

It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this Title.

(a) Any license or permit application made pursuant to the provisions of this Title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information re-

quired by this Title.

(2) . . . .

(3) False or fraudulent statements in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) . . . .

(6) . . . .

(7) . . . .

(8) . . . .

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be

limited to, the following:

(1) . . . .

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) . . . .

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) . . . .

(7) . . . .

(c) All business licenses issued under

this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable.

CHAPTER 4.06: POLICY AND PROCEDURE (SHOW CAUSE, LICENSE SUSPENSION, LIMITATION, REVOCATION)

4.06.010 DEFINITIONS:

As used in this chapter, the words and terms shall have the meaning ascribed to them pursuant to Title 4, unless a different meaning clearly appears in the context.

4.06.020 INVESTIGATION AND REPORTING OF VIOLATIONS:

The Director is responsible for the enforcement of business license regulations and ordinances and the investigations thereof. Those violations which the Director deems necessary for additional diciplinary action, in addition to the action taken by the Division, shall be reported to the City Council for appropriate action.

4.06.030 LICENSING DIVISION TO COOPERATE WITH OTHER REGULATORY AGENCIES:

(a) The Business License Division shall cooperate with other public agencies concerned with the regulation and control of business licenses, and to that end may exchange with such agencies any and all types of confidential information. When dealing with any gaming matter, the Division may immediately inform the State gaming agencies of any investigation, hearing or other actions that the Division, or its members or agents may take.

(b) The Division may enter into an agreement with the State gaming agencies such that duplication of effort shall be kept to a minimum; provided, however, that if the apparent violation is of such a character that action should be

taken and if the State gaming agencies fail, refuse or decline to assume control of the investigation and hearing, then the License Agent shall promptly investigate.

(c) The Division may enter into an agreement(s) with liquor and gaming boards in the incorporated and unincorporated cities and towns of Clark County so that overall regulation and control may be more effectively maintained.

4.06.040 COMPLAINT AGAINST LICENSE DETERMINATION BY CITY ATTORNEY:

In addition to any action taken by the Division, upon the report by the License Agent to the Director of a violation charging a licensee with the commission of any act which may be cause for additional disciplinary action, the City Attorney, or his deputy, shall determine the legal sufficiency of the

evidence, and, if necessary, may request the License Agent and/or Chief of Police to make further investigation of the alleged violation.

4.06.050 COMPLAINT SERVICE:

(a) Upon a finding by the City Attorney that there is sufficient evidence of a violation of the regulations or ordinances, or of a threat or hazard to the public health, safety, morals or welfare, he shall draft a written complaint which shall set forth in ordinary and concise language the violation(s) with which the licensee or affected person (respondent) is charged. The complaint shall specify the statute, regulation or ordinance which the respondent is alleged to have violated, or the hazard or threat to the public health,

safety, morals, welfare or good order and shall be signed by the Director.

(b) Upon the issuance of the complaint by the City Attorney, the City Council shall forthwith review it and determine by vote of the majority of the members present whether to impose any additional suspension, limitation, revocation or disciplinary action.

(c) The complaint shall direct the respondent, within ten days after service thereof upon him, to appear by filing with the City Clerk, his verified answer to the complaint. The answer shall state whether or not the respondent requests a hearing, and shall admit or deny the facts alleged in the complaint and raise all legal and factual issues the respondent desires the

City Council to consider. The complaint shall notify the respondent that failure to file an answer shall result in disciplinary action against him by default. Service of the complaint shall be made upon the respondent as provided by the Nevada Rules of Civil Procedure for the service of process in civil actions. Proof of service shall be filed with the City Clerk.

(d) The City Attorney shall thereafter be in charge of presenting the evidence to the City Council.

(e) Upon the filing of an answer, the Mayor shall fix a time and place for hearing and give the respondent not less than fifteen days notice. The City Clerk shall give notice of such hearing date and time to the respondent and the City Attorney by depositing in the United States

Certified Mail a true copy of the notice enclosed in a sealed envelope with postage thereon fully paid, addressed to the respondent and his attorney, if any, and the City Attorney at the address shown on the pleadings.

4.06.060 FORM OF ANSWER-FILING DEADLINE:

(a) The answer of the complaint shall be signed and verified by the respondent, or his agent, served upon the City Attorney which prepared the complaint, and filed with the City Clerk within ten days after service upon respondent of the complaint. The complaint and answer shall form the pleadings for the hearing.

(b) The answer shall read substantially as follows:

"BEFORE THE CITY COUNCIL OF THE CITY OF HENDERSON, COUNTY OF CLARK, STATE OF NEVADA, In the Matter of:

Disciplinary Action)
Against A.B.,)
)
) ANSWER
)

To the Members of the City Council:

(1) the respondent does not request a hearing. (Note: If a hearing is desire, omit word "not".)

(2) The Respondent admits the following facts set forth in the complaint:

(3) The Respondent denies the following facts set forth in the complaint:

(4) The Respondent believes the following defenses and explanations should be considered by the City Council:

(5) The Respondent raises the

following legal defenses:

LICENSEE

(c) Upon the filing of an answer, the respondent shall be entitled to a hearing on the merits upon the issues denied by the answer.

4.06.070 FAILURE OF LICENSEE TO ANSWER CHARGES DEEMED ADMISSION OF GUILT:

(a) Failure of the respondent to answer within the time specified shall be deemed an admission by him of the commission of the act or acts charged in the complaint. Thereupon, the City Council shall forthwith impose disciplinary action, as the case may be, and shall give notice of sucn disciplinary action by mailing a true copy thereof by United States Certified Mail in a sealed envelope with

postage thereon fully prepaid, addresses to the respondent at his latest address of record.

(b) Failure to file an answer within the time designated shall further constitute a waiver of respondent's right to a hearing and to judicial review of any decision or order, but the City Council, in its discretion, may nevertheless order a hearing. All affirmative defenses must be specifically stated and unless objection is taken in the answer, all objections to the form of complaint are waived.

4.06.080 SUBPOENA AND COMPENSATION OF WITNESSES:

At any time prior to a hearing or during a hearing before the City Council, the Council shall issue subpoenas and subpoenas duces tecum at the

request of a party. All witnesses appearing pursuant to subpoena, other than parties, officers or employees of the State of Nevada or any political subdivision thereof, shall receive fees and mileage in the same amounts and under the same circumstances as provided by law for witnesses in civil actions in the District Court. Such fees shall be paid by the party at whose request the witness is subpoenaed and the City Council may, in its discretion, award as costs the amount of all expenses of witnesses to the prevailing party.

4.06.090 WITNESS-AFFIDAVIT-SERVICE:

The testimony of any material witness residing within or without the State of Nevada may be taken by deposition in the manner provided by the Nevada Rules of Civil Procedure. Affidavits may be received in evidence

at any hearing of the City Council in accordance with the following:

(a) The party wishing to use such affidavit shall, not less than four days prior to the day set for the hearing, serve upon the opposing party or counsel, either personally or by certified mail, a copy of the affidavit which he proposes to introduce in evidence together with a notice as provided in subsection (c) of this section.

(b) Unless the opposing party, within two days after such service, mails or delivers to the proponent a request to cross-examine affiant, his right to cross-examine such affiant is waived and the affidavit. if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to

cross-examine an affiant is not afforded after the request therefor is made in accordance herewith, the affidavit may be introduced in evidence, but shall be given only the same effect as other heresay evidence.

(c) The notice referred to in subsection (a) of this section shall be substantially in the following form:

"The accompanying affidavit of (name of affiant) will be introduced as evidence at the hearing set for the _____ day of _____, 19__.

(name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify the undersigned that you wish to cross-examine him. To be effective your request must be mailed or delivered to the undersigned on or before two days from the date of this notice and the enclosed affidavit are served upon you.

_____
(Party or Counsel)

_____
(Address)"

4.06.100 HEARING PROCEDURE- RECORD:

The following procedures shall apply at all hearings of the City Council:

(a) A quorum of the City Council shall be present at every hearing, and they shall exercise all powers relating to the conduct of the hearing and shall enforce all decisions with respect thereto.

(b) No member of the City Council who did not hear the evidence shall vote on the decision.

(c) The proceedings at the hearing shall be reported either stenographically and/or by audio recorder.

(d) Oral evidence shall be taken upon oath or affirmation administered by the City Clerk.

(e) Every party to a hearing shall have

the right:

(1) To call and examine witnesses; and

(2) To introduce exhibits relevant to the issues of the case, including the transcript of testimony at an investigative hearing conducted by, or on behalf, of the Division or City Council.

(3) To cross-examine opposing witnesses on matters relative to the issues of the case, even though the matter was not covered in a direct examination; and

(4) To impeach any witness regardless of which party called him to testify; and

(5) To offer rebuttal evidence.

(f) If the licensee does not testify in his own behalf, he may be called

and examined as if under cross-examination.

(g) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted and shall be sufficient to support a finding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action.

(h) The parties or their counsel may, by written stipulation, agree that certain specified evidence may be admitted even though such evidence might otherwise be subject to objection.

4.06.110 JUDICIAL NOTICE- EVIDENCE ADMISSIBLE:

(a) The City Council may take official notice of any generally accepted information or technical or scientific matter within the area of business licensee conduct and control and of any fact which may be judicially noticed by the courts of this state.

(b) The parties shall be informed of any information, matter or fact so noticed, and shall be given a reasonable opportunity, on request, to refute such information, matter or fact by evidence or by written or oral presentation of authorities, the manner of such refutation to be determined by the City Council.

4.06.120 AMENDMENT- FILING OF AMENDED PLEADINGS:

The City Council may, in its discretion, before submission of the case for decision, permit the filing of amended or supplemental pleadings and shall notify all parties thereof, and provide a reasonable opportunity for objections thereto.

4.06.130 MISCONDUCT DURING HEARING-REFERRAL TO DISTRICT COURT-CONTEMPT:

If any person in proceedings before the City Council disobeys or resists any lawful order or refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during the hearing or near the place thereof so as to obstruct the proceedings, the City Council may, in addition to remedies available to it, certify the facts to the District Court. The court shall thereupon issue an order

directing the person to appear before the court and show cause why he should not be punished for contempt. The court order and a copy of the statement of the City Council shall be served on the person cited to appear. Thereafter the court shall have jurisdiction of the matter; and the proceedings shall be had, the same penalties may be imposed, and the person charged may purge himself of the contempt as in the trial of a civil action before a District Court.

4.06.140 WRITTEN DECISION OF CITY COUNCIL- MAJORITY VOTE NECESSARY:

After the hearing of a contested matter, the City Council shall render a written decision on the merits which shall contain of fact, a determination of the issues presented and the disciplinary action to be imposed, if any, and shall thereafter make and enter

its written order in conformity with such decision. The affirmative votes of a majority of the City Council hearing the evidence shall be required to impose any disciplinary action. Copies of the decision and order shall be served on the parties personally or sent to them by certified mail. The decision shall become and remain effective upon such service, unless the City Council shall otherwise order.

4.06.150 AGGRIEVED PARTY- PETITION FOR REHEARING:

Within ten days after service of an order of the City Council, any party aggrieved may petition for a rehearing. Such petition shall not be granted except upon a showing that there is additional evidence which is material, necessary and reasonably calculated to change the decision of the City Council.

The petition shall be supported by an affidavit of the moving party or his counsel showing with particularity the materiality and necessity of the additional evidence and the reason why it was not introduced at the hearing. Upon rehearing, rebuttal evidence to the additional evidence shall be permitted. After rehearing, the City Council may modify its decision and order as the additional evidence may warrant.

4.06.160 JUDICIAL REVIEW:

Any person aggrieved by final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court.

(a) The judicial review shall be

instituted by filing a petition within twenty days after the effective date of the final decision or order. A petition for review may not be filed while a petition for rehearing is pending before the City Council. The petition for review shall set forth the order or decision appealed from, and shall set forth the specific rulings on questions of law which the petition contends constitutes error.

(b) Copies of the petition shall be served upon the City Council and all other parties of record, or their counsel of record, either personally or by certified mail.

(c) The filing of the petition shall not stay enforcement of the decision or order of the City Council, but the City Council itself may

grant a stay upon such terms and conditions as it deems proper, upon timely-filed motion.

(d) Upon written request of petitioner and upon payment of such reasonable costs and fees as the City Council may prescribe, the complete record on review, or such parts thereof as are designated by the petitioner, shall be prepared by the City Council or designated.

(e) The complete record on review shall include copies of all pleadings in the case, all notices and interim orders issued by the City Council in connection with the case, all stipulations, the decision and the order appealed from, a transcript of all testimony, evidence and proceedings at the hearing, the exhibits admitted or rejected, and any other papers in the case.

(f) A copy of any document may be used in lieu of an original. The record on review may be shortened by stipulation of all parties to the review proceedings. (Ord. 1114, March 7, 1989).

(2)

Supreme Court, U.S.
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No. 92-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA,

RESPONDENT

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.7 of the Rules of the United States Supreme Court, Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of Henderson, Nevada (hereinafter collectively

referred to as "Petitioner"), file this Supplemental Brief for the purpose of calling this Court's attention to the Decision and Final Judgment of the United States District Court, District of Nevada, in the trial court below which Petitioner received in the United States Mail on Monday, November 30, 1992). A copy of said Decision and Judgement is attached hereto as Appendix "A" to this Supplemental Brief. Petitioner contends that the entry of this Decision and Final Judgment by United States District Court Judge Lloyd D. George on November 27, 1992 constitutes a direct violation of the Eleventh Amendment to the Federal Constitution, which requires immediate review by this Court.

Petitioner was informed by Deputy Clerk Basil on Tuesday, December 1, 1992, that the City's Petition for Writ of Certiorari herein in No. 92-643 (hereinafter "Petition") will be before

the United States Supreme Court for a decision at its conference on Friday, December 4, 1992.

Petitioner contends that the United States District Court's Findings of Fact and (Erroneous) Conclusions of Law in its November 27, 1992 Decision (see Appendix A) unequivocally establish Petitioner's right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Watson v. Buck, 313 U.S. 387 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act, as requested in the Petition for Writ of Certiorari (see Petition in No. 92-643 at pages 3-4 and Conclusion at page 62), or pursuant to the grant of its Petition for Writ of Certiorari and oral argument on Questions I and IV of said Petition (see Petition in No. 92-643 at pages i and iii).

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much."

(Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

(A) RELIEF PURSUANT TO THE ALL WRITS ACT.

Petitioner requests this Court to take Judicial Notice of the Findings of Fact and Erroneous Conclusions of Law in the federal trial Court's November 27, 1992 Decision in so far as those Findings impact Petitioner's pending request for immediate relief under Case No. 92-643 as to the 11th Amendment violation. These additional factors militate against all philosophical arguments that the claims in 92-643 will only support a claim for discretionary relief, but will not support a claim for mandatory relief. Because this Supplemental Brief in No. 92-643 presents this Court with the same issues which will be presented to this Court on an appeal from the trial Court's judgment, and because the right to immediate extraordinary relief under Huffman and Watson is so clear, this

Court should resolve the matter now in No. 92-643, once and for all, and should not require Petitioner to start all over and run the gauntlet with an Appeal from the November 27, 1992 judgment.

(B) IRREPARABLE HARM TO THE CITY.

The United States District Court's Findings of Fact and Erroneous Conclusions of Law in its November 27, 1992 Decision constituted an egregious violation of this Court's often stated policy against federal interference in important state matters (i.e. control over the prevention of obtaining a business license by fraudulent means) which are in train in the state's (quasi) judicial system, and evidence a clear disregard of this Court's long line of precedential authorities on "comity" and "jurisdiction" in abstention cases.

The harm that Petitioner envisioned

would occur [namely, an interpretation of state law and city ordinances that is erroneous and authoritative but non-definitive, which would require additional duplicative and unnecessary litigation in both the state and federal court], has occurred. Not only are the United States District Court's ruling [regarding the scope and interpretation of Nevada procedural law] contrary to what Petitioner contends the state trial court's rulings will be in the state court system, attorneys for the Real Parties in Interest have now given notice that they will hereafter proceed with further litigation in both the state system and on an appeal in the federal system.

One of the more egregious rulings of the United States District Court is its ruling that even though federal plaintiffs failed to established that a federal civil rights violation had

occurred; that it will not award attorneys fees to the City under the test established by this Court as to an award of attorney fees for prevailing defendants in the dismissal of a 42 U.S.C. Section 1983 federal civil rights action, notwithstanding the Court found as the basis for its dismissal (as the City Council had found in the first instance) that the Real Parties in Interest had fraudulently obtained the City license.

(C) THE NOVEMBER 27TH JUDGMENT DOES NOT MOOT THE PETITION FOR WRIT OF CERTIORARI IN CASE NO. 92-643.

If this Court does not grant immediate relief under Case No. 92-643, Petitioner will have to start all over again and appeal the November 27th Judgment on the failure to award attorney fees and on the grounds that the Court's rationale is patently erroneous and is not a correct, definitive statement as to the interpretation which a

state trial Court would give to the Henderson City Ordinances and the state procedural law which governs the appellate process in cases where licenses are revoked under the Henderson ordinance.

(D) CONTENTIONS OF THE CITY OF HENDERSON THAT THE FEDERAL DISTRICT COURT HAS EGREGIOUSLY INTERFERED WITH IMPORTANT STATE INTERESTS AND THE STATE JUDICIAL PROCESS, AND HAS RENDERED A DECISION WHICH IS ERRONEOUS AND AUTHORITATIVE BUT NOT DEFINITIVE, AND WHICH IS AT ODDS WITH NEVADA STATE LAW UNDER AN "AUTHORITATIVE" INTERPRETATION BY THE STATE COURT WHICH MUST NOW BE SOUGHT BY THE CITY.

Following lengthy public hearings and proceedings, the City of Henderson enacted a new comprehensive municipal zoning and license Code, the provisions of which have never been reviewed by the State of Nevada judicial system. Petitioner City of Henderson contends that if such provisions are litigated in the State Court system by a State Court which (unlike the federal Court) is authorized to reach an authoritative

interpretation, the City Ordinances will be given the following differing interpretations than those given by the United States District Court, for the following reasons:

1. Only a state court can give a state statute or city ordinance an authoritative and definitive interpretation.

2. A federal Court must defer to a state court which has been requested to give a newly enacted ordinance its first authoritative interpretation. Watson v. Buck, 313 U.S. 387 (1941).

3. The City Council, acting as a quasi-judicial body, has the power to conduct hearings and revoke business licenses which have been procured through fraud. H.M.C. Sections 4.06.010 - 44.06.160.

4. Under the City Charter and state law, the City Council has the power to enact City Ordinances setting

forth quasi-judicial procedures which are to be followed in conducting hearings which are brought before it relating to the revocation of a business license which City administrative officials claim has been procured through a fraudulent application of the license.

5. Under federal law, a state has the power to determine at what stage in the proceedings a a licensee may make a constitutional challenge to a City ordinance or state statute, so long as the licensee is given a fair and reasonable opportunity to claim his federal constitutional rights. State law may permit such litigation of federal constitutional issues in state court proceedings and forms not permissible in the federal courts. Adler v. Bd. of Education, 342 U.S. 485, 96 L.Ed. 517, 529, 72 S.Ct. 380, 27 A.L.R.2d 472 (1952) (dissenting opinion); see Antieau, Modern Constitu-

tional Law, Vol. 2, pp. 635-638 at Section 15.14, "Rules Governing the Litigation of Constitutional Questions in State Court."

6. The City Council has the power under Nevada law to enact a procedure in which it determines that it should conduct license revocation hearings under a general presumption that the state statutes and city ordinances are constitutional and that such federal constitutional challenges shall be heard by the Nevada District Court, and not by the City Council, so long as it affords the licensee an opportunity to contest the federal constitutionality of such laws in the Nevada District Court and suspends enforcement of its Order until after such Constitutional challenge has been made and ruled upon by the Nevada District Court.

7. Henderson Municipal Code, H.M.C. Section 4.06.160 provides as

follows as to the scope of review by the state District Court:

> "4.06.160 Judicial Review. Any person aggrieved by final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court." (Our Emphasis.)

The above words and phrases reading "judicial review of questions of law thereto in the Eighth Judicial District Court" were intended by the City Council to codify the scope of review which the Nevada Courts presently apply to questions of law (which includes mixed questions of law and fact. In some cases, the scope of review in Nevada Courts is limited to issues which are presented in the administra-

tive record before the City at the time of its decision; in other cases the scope of review is broader and approaches a review de novo. See Alberty v. City of Henderson, 106 Nev. 299 (1990), at 302-304. In either event [including the narrower review limited to those issues appearing in the administrative record], where a federal constitutional challenge is presented by the licensee at the City Council hearing, the challenge is a "matter of record", and the resolution of such a legal challenge, as applied to the specific facts of the case would, under H.M.C. Section 4.06.160, be a "question of law" subject to judicial review by the Eighth Judicial District Court. Further, the rule of law as to the meaning of such language differs from State to State and there is no controlling general law. Compare the United States District Court's

ruling in this regard in its Decision at page 4, line 4 through page 6, line 5 (Appendix A).

The United States District Court's conclusion in its Decision at page 4, lines 18-19, that abstention is not compelled, reading:

> "Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention."

is erroneous because the underlying conclusion that the constitutional claims are not subject to review under the Henderson Municipal Code is itself erroneous.

8. There is a marked difference in the way in which the state and federal courts approach a resolution of the constitutional issue regarding legislation. The state courts are obliged to render a construction of state legislation which will arrive at

a constitutional result. See Petition at page 53-57. On the other hand, a federal trial court, with a "subconscious" interest in resolving constitutional disputes (and which denies that comity demands abstention) will have an inclination to deny the applicability of Huffman v. Pursue, Ltd., with the jurisdictional requirement for "heightened pleadings" set by this Court (see Petition at Question IV on page iii and "Conclusion" at pages 63-64) by giving to the words and phrases described in the above paragraph 7 an awkward, narrow, and constrained construction which will defeat the Huffman requirement. See also the United States District Court's comment on its view of abstention at Appendix A, at the first full paragraph on page 3.

9. Petitioner concedes that rightfully or wrongfully, the United States District Court had "jurisdiction to

determine the question of jurisdiction" [see U.S. v. United Mine Workers of America, 330 U.S. 258 (1974), and Petition at page 52] up to and including November 27, 1992, in as much as it had not, until that date, responded to Petitioner's Huffman challenge to jurisdiction (see Petition at page 19, fn. 5), and the appellate courts had not taken any action to require it to decide the Huffman "heightened pleading" requirement.

10. Petitioner contends that one of the issues which is properly raised by the Younger-Huffman abstention issue is whether the federal court lacks "subject matter jurisdiction" to decide the merits of federal plaintiffs' claims. It is clear beyond doubt that the foundation for the Younger-Huffman challenge is the Eleventh Amendment to the Federal Constitution. If a federal Court were to find that an Eleventh

Amendment violation had occurred, it would have to conclude as a matter of law that the jurisdiction of the subject matter was in the state court and, at that stage of the proceedings and for that reason, the federal court would lack "subject matter jurisdiction." See also and compare the "in rem" exception discussed in Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705 at page 713-714 re Toucey v. New York Life Insurance Co.

11. The City has not changed the contention it made in the federal court proceedings. The City has continuously argued to the United States District Court that abstention was required because "proceedings were en train to accomplish those tasks" (direct appeal to the State of Nevada District Court) at the time the federal complaint was filed. See Petition for Rehearing filed in connection with the Petition for Writ of Certiorari in No. 90-1771, filed

November 1, 1991, at pages 19-20, reading:

> "The trial judge had general jurisdiction to determine whether he had subject matter jurisdiction, i.e. to determine whether the complaint stated a valid cause of action under the civil rights statute, 42 U.S.C. section 1983. Having been informed (1) that the City of Henderson had initiated quasi-judicial proceedings under City of Henderson ordinances which authorized the City Council to act in a quasi-judicial capacity to determine whether a business license had been wrongfully obtained through fraud, and (2) that the city ordinance and state statutes authorized a direct appeal from the City Council's determination to the District Court of Nevada, and (3) that proceed-

ings were en train to accomplish those tasks, the trial judge had exhausted his general jurisdiction, in that he was required to conclude:

> (1) that a valid civil rights lawsuit had not been pleaded; (2) that he had no jurisdiction to enjoin the City of Henderson from proceeding under valid ordinances and statutes; and (3) that, under Huffman v. Pursue, Ltd., supra, he must dismiss the civil rights lawsuit for lack of subject matter jurisdiction and failure to state a cause of action.

At the time federal plaintiffs filed their federal complaint, Nevada procedural law provided federal plaintiffs with an effective opportunity to raise all constitutional claims before the state reviewing courts. Federal plaintiffs' election not to appeal within the state system the state

administrative finding of fraud and license revocation order does not change the fact that a plaintiff "cannot escape Younger abstention by failure to assert its state remedies in a timely manner." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), footnote 16, at 16.

12. Henderson Municipal Code, H.M.C. Section 4.06.160 authorizes judicial review of "questions of law," which includes review of any constitutional questions raised by licensees in City Council license revocation hearings, and will be so interpreted by the Nevada Court, when and if it is allowed to be so construed by the State of Nevada Courts. Petitioner's claim is sufficient to compel abstention under Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975). Compare the United States District Court's Decision at page 4, line 4, through page 6, line 5.

13. The federal trial Court's

Findings of Fact that:

> "As permitted by H.M.C. Section 4.04.150, the Court revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(see Decision at page 8, lines 12-14) and its Conclusion of Law that:

> "It is evident that Plaintiffs attempted to avoid the City's zoning and licensing regulations through deception."

(see Decision at page 8, lines 15-16), conclusively establishes the validity of Petitioner's claim that Plaintiff has not and cannot provide the "heightened pleadings" which this Court's decision in Huffman v. Pursue, Ltd. requires. The United States District Court was therefore required to grant Petitioner's Motion to Dismiss on the authority of Huffman rather than proceeding to render a decision on the merits of federal

plaintiffs claim, reexamining de novo the "fraud" and "revocation" issues, and dismissing for the erroneous reasons given in its decision (which are chronicled in this Supplemental Brief).

The United States District Court's Finding of Fact that the plaintiffs obtained the license "through deception" demonstrates that the federal court has decided the very question of law that the Nevada District Court should have been allowed to make. By upholding and confirming the action taken by the Henderson City Council, the federal trial court improperly juxtaposed itself as an "appellate" court between the City Council and the Nevada District Court and the Nevada Supreme Court, contrary to federal law and in violation of the legislative provisions of the Nevada appellate procedure, pursuant to which the Nevada District Court has been designated as the Court

which had jurisdiction to hear direct appeals on federal constitutional questions raised at the City Council's License Revocation Hearing. This part of the United States District Court's Decision and Judgment of November 27, 1992 unequivocally demonstrates the merits of Petitioner's claims in this Supplemental Brief:

> (1) of an actual, not theoretical 11th Amendment violation of the United States Constitution occurred on November 27, 1992 at the time of entry of the United States District Court's Decision and Judgment;
>
> (2) that the United States District Court lacks "subject matter" jurisdiction, because the state court has jurisdiction of the subject matter on the important questions of law (including mixed questions of law and fact) re

license revocation by the City Council, based on licensees' fraud; and

(3) of an immediate right to relief under the All Writs Act as requested in the Petition in No. 92-643 and a right to attorneys fees under 42 U.S.C. Section 1988.

In sum, it is Petitioner's contention in this Supplemental Brief that Huffman v. Pursue, Ltd. is apposite; that the United States District is required to apply the "heightened pleading" rule judicially established by this Court in Huffman, and that said federal court has erroneously failed to do so; that a valid civil rights cause of action has not been stated under 42 U.S.C. Section 1983, and that this was apparent on Petitioner's Motion to Dismiss; that the United State District Court's ruling on the merits on the fraud issue and entry of a Final Judg-

ment as to that issue on November 27, 1992 constitutes a usurpation of the Nevada District Court's appellate jurisdiction and, as such, is a patent violation of the 11th Amendment and this Court's stated policy re "comity" between the states and federal judicial systems which has been fashioned to avoid 11th Amendment conflicts; that while the United States District Court was correct in finding no cognizable federal civil rights violation existed, the rationale followed in its Decision at page 8, lines 15-19 (see Appendix A), explaining its refusal to address plaintiffs' constitutional challenge as presented in the civil rights lawsuit, after it had reviewed the evidence, reading:

> "It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly,

> plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law."

appears to be nothing more than an application of the "clean hands" equitable doctrine, and would be a proper ruling for the Nevada District Court for the Eighth District on appeal to that state court of the City Council's fraud finding, but an erroneous ruling for the United States District Court, District of Nevada, sitting as a trial court in the federal civil rights lawsuit below.

Petitioner respectfully contends that the United States District Court at paragraph 2, footnote 1, reading:

> "Equally distressing, however, is that the City's counsel failed to properly

identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because 'none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary.' This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception."
is not well taken in as much as Petitioner did not envision the United States District Court would position itself in the stead of the Nevada District Court, and claim the right of appellate jurisdiction over the record in the City Council Hearing and its Finding of Fraud.

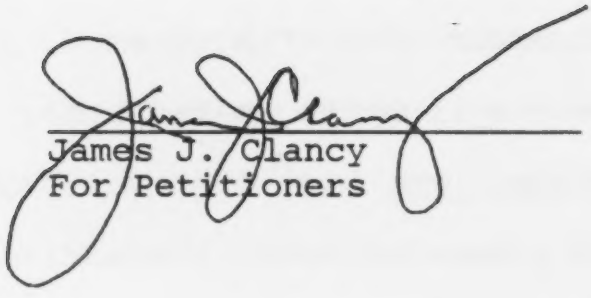
CONCLUSION

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a

United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

Dated: December 2, 1992

Respectfully Submitted,



James J. Clancy
For Petitioners

APPENDIX A

DECISION AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA, BY THE HONORABLE LLOYD D. GEORGE, ENTERED NOVEMBER 27, 1992 IN CV-S-90-264-LDG(LRL)

[Reference: Supplemental Brief at pages 1, 2, 3, 12, 13, 16, and 17.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

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[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs' (Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) JUDGMENT [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

LLOYD D. GEORGE
United States District Judge